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In the Supreme Court of the United States

OCTOBER TERM, 1996

ERNST & YOUNG LLP, PETITIONER

v.

P. LARUE SIMPSON, RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and numerous other federal statutes confer protections on "employees" but not on partners. The question presented is:

Whether a partner in a *bona fide* general partnership duly created under state partnership law, who enjoys all of the rights of other partners under the partnership agreement, may sue as an "employee" under ADEA and ERISA?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ernst & Young LLP respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 100 F.3d 436. The opinion of the district court denying summary judgment on all but one claim (App., *infra*, 15a-27a) is unreported. The district court's subsequent opinions resolving the employee/partner issue (*id.* at 28a-58a) and the ERISA claim (*id.* at 59a-97a) are reported at 850 F. Supp. 648 and 879 F. Supp. 802, respectively.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1996, and a timely petition for rehearing was denied on January 24, 1997 (App., *infra*, 98a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Age Discrimination in Employment Act and the Employee Retirement Income Security Act are set forth at App., *infra*, 99a-100a.

STATEMENT

This case arises out of the involuntary separation of Peyton LaRue Simpson, a certified public accountant ("CPA") who held the position of partner, from the general partnership of Ernst & Young. Simpson, who was 46 years old at the time he was asked to leave, brought suit against the partnership alleging violations of two of the many federal statutes that confer rights on "employees" but not on partners: the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* Simpson also advanced a claim under an Ohio age discrimination statute that grants protections to employees but not to partners. At a bifurcated trial, the district court first determined that Simpson was an employee rather than a partner; the case then proceeded to the merits, and the jury returned a multimillion dollar verdict in Simpson's favor. The court of appeals affirmed, holding that "the

distinction between partners and employees" under a host of federal statutes turns on an evaluation of more than a dozen "common-law principles" drawn from the Uniform Partnership Act. Applying those principles, the court concluded that Simpson qualified as an employee rather than a partner.

A. Background to the Litigation

On October 1, 1989, two "Big Eight" accounting partnerships, Arthur Young & Company ("Arthur Young ", and Ernst & Whinney, merged to form Ernst & Young. App., *infra*, 3a-4a. As a national firm with over 2,000 partners, Ernst & Young established a Management Committee, consisting of 10 to 14 partners and a chairperson, to oversee and manage its day-to-day operations. *Id.* at 6a-7a, 14a, 20a, 30a-31a. Under the terms of the Ernst & Young partnership agreement, the Management Committee was delegated the authority to make decisions — upon a vote of at least two-thirds of its members — concerning the addition or removal of partners, the allocation of partnership profits, and the appointment or removal of the Committee's chairperson. *Id.* at 6a-7a; Def. Exh. 545, § 3(d).

Despite this centralized management structure, the partners of Ernst & Young retained significant authority, including the power to elect 18 of the 23 positions on the Advisory Council, which advises the Management Committee (and which, like the Management Committee, was authorized to make certain decisions but only upon a two-thirds vote). App., *infra*, 30a; Def. Exh. 545, § 5. In addition, partners were entitled to vote on amendments to the partnership agreement, "major combinations" undertaken by the firm (including mergers, asset sales, and purchases that were above a certain size), and dissolution of the partnership. App., *infra*, 32a-33a; Def. Exh. 545, § 17. New York law, which governed the Ernst & Young partnership agreement at issue in this case, permits a partnership to structure its internal affairs and management in this way. App., *infra*, 40a, 42a.

Peyton LaRue Simpson joined Arthur Young as a partner in December 1986 and served as the managing partner of the firm's Cincinnati office. App., *infra*, 4a. Following the merger, Simpson was named Director of Entrepreneurial Services for Ernst

& Young's Cincinnati office, with responsibility for implementing a national strategic plan. *Id.* at 4a, 34a.

Simpson voted for the merger and signed the partnership agreement, thereby becoming a partner in Ernst & Young. App., *infra*, 4a. As such, Simpson was accorded all of the rights of a partner under the Ernst & Young partnership agreement.[1]

Simpson also contributed $84,000 in capital to Ernst & Young. App., *infra*, 31a. Although the firm arranged for Simpson to borrow this money from a bank, and paid interest to partners on their capital contributions, the firm did not guarantee the loan and required that it eventually be repaid in full. *Ibid.* In addition to making this capital contribution, Simpson assumed joint and individual liability for all of the partnership's debts. *Id.* at 32a. During his tenure at the firm, Simpson also held himself out to the public as an Ernst & Young partner (*id.* at 18a, 37a) and represented on his federal tax return that Ernst & Young was a partnership and that he was a partner. *Id.* at 32a.

As a partner in Ernst & Young, Simpson's compensation consisted of two parts: a fixed annual "salary" (which Ernst & Young regarded as an advance distribution of profits), and a final "allocation" of profits. App., *infra*, 32a; 12/9/93 Tr. 492-493. The allocation of profits, which both Simpson and Ernst & Young characterized as a distribution of partnership earnings for federal income tax purposes, was determined by the firm's Management Committee based on the profitability of the partnership as a whole. App., *infra*, 32a; 12/9/93 Tr. 492-493. In setting each partner's allocation, the Management Committee considered performance,

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[1] For simplicity's sake, we refer to the "Ernst & Young partnership agreement" even though there were, in fact, two partnership agreements. The first agreement governed a general partnership called "Ernst & Young" which, at the time of the events underlying this lawsuit, rendered accounting and auditing services and — as required of such partnerships by most state accountancy laws — consisted solely of CPAs. 12/6/93 Tr. 211-213; 12/9/93 Tr. 456; App., *infra*, 4a, 30a. The second agreement governed a general partnership called "Ernst & Young U.S.," which consisted of both CPA and non-CPA partners. App., *infra*, 4a, 30a. As a partner who was also a CPA, Simpson was a signatory to both agreements. *Id.* at 4a.

level of responsibility, years of service, and other factors. App., *infra*, 32a.

Following the merger, Ernst & Young experienced a significant, unanticipated decrease in revenues. 4/26/94 Tr. 220-21; 5/2/94 Tr. 1087-1088; 5/3/94 Tr. 1205; Def. Exh. 565. As a result, the Management Committee decided to seek the resignation of more than 120 partners, including Simpson. App., *infra*, 5a. Ernst & Young also had concerns about Simpson's very low productivity, his questionable professional judgment (because of his failure to make timely repayments on two personal loans from a bank that was an audit client of the partnership), and his poor business decisions relating to the firm's lease of office space. 5/3/94 Tr. 1183, 1193-1204; 5/5/94 Tr. 1657-1658. Thus, in May 1990, pursuant to the partnership agreement, Simpson was asked to resign. App., *infra*, 16a. After he refused, Simpson was separated from the partnership as of December 19, 1990. *Ibid.*

B. Proceedings in the District Court

On March 25, 1991, Simpson filed this action alleging (1) age discrimination in violation of both ADEA and a parallel Ohio statute, Ohio Rev. Code § 4101.17 (Anderson 1989), (2) unlawful discharge for the purpose of preventing the attainment of ERISA benefits and in retaliation for exercising ERISA rights, and (3) unjust enrichment under Ohio common law. App., *infra*, 1a, 28a.

1. Following discovery, the parties filed cross-motions for summary judgment. App., *infra*, 2a. In its motion, Ernst & Young argued that Simpson was a partner or co-owner rather than an employee and that, accordingly, he had no valid claim under ADEA, ERISA, or the Ohio age discrimination law. *Ibid.* Among other things, Ernst & Young identified the following indicia of Simpson's status as a partner: "he was entitled to vote on the merger between Arthur Young and Ernst & Whinney; he voted in favor of creating Ernst & Young; he signed the partnership agreement; he had the right to participate in the management and operation of Ernst & Young subject to the partnership agreement; he was required to make capital contributions to the partnership; he received distributions of the partnership's profits; he was jointly liable with his other partners for the obligations of

the partnership; [and] he reported his income to the [IRS as partnership income] * * * ." *Id.* at 18a.

On March 26, 1993, the district court denied Ernst & Young's motion for summary judgment with respect to Simpson's ADEA, ERISA and Ohio age discrimination claims on the ground that there were genuine issues of material fact concerning Simpson's status as an employee or a partner. App., *infra*, 15a-22a, 25a, 27a.[2] The court acknowledged that "a plaintiff actually holding the status of a general partner is not an 'employee' within the meaning of the ADEA," but stated that merely "labeling [Simpson] a 'partner' does little to illuminate the actual nature of his employment relationship with Ernst & Young." *Id.* at 17a-18a. Instead, the court explained, it was necessary to ascertain "the economic reality of plaintiff's employment relationship with Ernst & Young * * * by examining the totality of circumstances under the standards courts have traditionally used to distinguish employees and partners such as those set forth in the [Uniform Partnership Act] and the dual factors of compensation and control." *Id.* at 19a.

Applying that approach, the district court reviewed various provisions of the Ernst & Young partnership agreement and concluded, among other things, that Simpson "had no voice in the management of Ernst & Young, while more powerful individuals — the Chairman and other members of the Management Committee — held sway over Ernst & Young's destiny." App., *infra*, 19a. The court refused to give any weight to the fact that Ernst & Young's structure for internal governance was the product of voluntary agreement among Ernst & Young's partners (including Simpson), categorically declaring that "[i]t is of *no* significance for purposes of analyzing plaintiff's actual employment relationship with Ernst & Young that plaintiff voted in favor of the merger or signed the partnership agreement." *Id.* at 21a (emphasis added).

2. Having determined that factual issues precluded summary judgment, the district court proceeded to order a bifurcated trial, with the first phase limited to determining whether Simpson was

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[2] The district court granted summary judgment in favor of Ernst & Young on Simpson's unjust enrichment claim. App., *infra*, 25a-27a.

an Ernst & Young "partner" or "employee." App., *infra*, 2a. Shortly thereafter, a United States Magistrate conducted a four-day trial of the first phase, which resulted in a mistrial when the jury deadlocked. *Ibid.* The parties then agreed to re-submit cross-motions for summary judgment addressing the "partner versus employee" issue, taking into account the testimony and exhibits that had been submitted during the trial. *Ibid.*

On April 24, 1994, the court ruled in Simpson's favor, concluding that Simpson qualified as an employee rather than as a partner. App., *infra*, 28a-58a. The court acknowledged that "neither the Supreme Court nor the Sixth Circuit had addressed the proper test to be used to distinguish partners from employees," but drew guidance from this Court's decision in *Nationwide Mutual Ins. Co.* v. *Darden*, 503 U.S. 318 (1992), which held that "traditional agency law criteria should be used to determine whether the plaintiff was an independent contractor or an employee under ERISA." App., *infra*, 38a-39a. Despite its different context, *Darden*, the court explained, "strongly counsels the use of traditional legal principles to determine" Simpson's status as a partner. *Id.* at 39a. The court elaborated (*id.* at 40a):

> What is pertinent about *Darden*'s agency law test is the Court's comparison of the independent contractor characteristics the claimant possessed to his employee characteristics * * * . No one factor is controlling. The *Darden* rationale also rejects the premise that if the claimant possessed any characteristics of an independent contractor, he could not be considered an employee under the traditional agency law test.

Consistent with this analysis, the court proceeded to examine whether Simpson possessed "the total bundle of partnership characteristics" embodied in the "[t]raditional partnership law concepts" found in New York law or the Uniform Partnership Act. App., *infra*, 44a, 47a (internal quotations omitted) According to the court, most of the traditional characteristics of partners were not present in Simpson's case. *Id.* at 47a-55a. For example, the court found that Simpson's capital contribution was "more akin to a loan than a capital contribution." *Id.* at 47a. In addition, the court concluded that Simpson did not share in the firm's profits and losses because neither his "salary" nor his "allocation" were "calculated as a proportionate share of the firm's profits." *Id.* at

48a; see also *id.* at 49a (faulting the partnership agreement for "fail[ing] to set forth any formula for calculating allocations"). The court further explained that Simpson "had no other indicia of an ownership interest in the firm" such as the power to alter decisions of the chairperson or the Management Committee (*id.* at 49a-51a), had no unconditional "right to examine the firm's records and books" or to learn the compensation of other partners (*id.* at 51a), and had "little, if any, management authority" regarding Ernst & Young's operations (*ibid.*).

In sum, the court concluded that Simpson "ha[d] many qualitative characteristics of an employee and few, if any, attributes of a *bona fide* partner." App., *infra*, 54a. Accordingly, the court held that "Simpson was an employee protected against age discrimination under ADEA." *Ibid.* For the same reasons, the court opined, Simpson was "subject to ERISA protection." *Id.* at 57a.

3. The case proceeded to a trial on the merits of the ADEA claim. App., *infra*, 3a. On May 12, 1994, the jury returned a verdict finding that age was a determining factor in Simpson's discharge and that Ernst & Young's ADEA violation was willful. *Ibid.* The jury awarded Simpson past earnings of $524,746, past benefits of $421,747, future earnings of $1.5 million, and future benefits of $290,782. 10/28/94 Order, at 3.[3]

On September 23, 1994, the court issued a separate opinion disposing of Simpson's ERISA claim. App., *infra*, 59a-97a. Relying on its previous determination that Simpson was an "employee" entitled to bring suit under ADEA and the Ohio age discrimination statute, the court held that Simpson was an "employee" under ERISA. *Id.* at 71a, 73a-75a. The court concluded that Simpson's discharge was intended to interfere with the attainment of ERISA benefits and in retaliation for persistent

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[3] On the basis of the jury's finding that Ernst & Young's ADEA violation was willful, the court also awarded Simpson liquidated damages in an amount equal to his past earnings and past benefits. See 10/28/94 Order, at 3. In the same order, the court awarded Simpson prejudgment interest on past earnings and past benefits under the Ohio age discrimination law. App., *infra*, 3a.

requests for information concerning ERISA benefits, and it awarded him damages of $712,529, which were set off against the ADEA award. *Id.* at 87a-91a, 97a.

C. The Court of Appeals' Decision

The Sixth Circuit affirmed, holding that Simpson "does not qualify as a partner for purposes of the ADEA, ERISA, and Ohio Rev. Code § 4101.17." App., *infra*, 11a. As an initial matter, the court of appeals stated that "the distinction between a 'partner' and an 'employee' under both ADEA and ERISA is a preliminary jurisdictional issue" that may be resolved "as a matter of law" where, as in this case, "the parties stipulated that no conflict of material fact existed as to this issue." *Id.* at 2a.

The court of appeals observed that "neither this circuit nor the Supreme Court ha[s], to date, considered the partner versus employee question." App., *infra*, 9a. It determined that, in analyzing the distinction between employees and partners, it would "evaluate the undisputed facts" against the following, nonexhaustive list of more than a dozen "common-law principles as codified in the" Uniform Partnership Act (*id.* at 10a):

> [1] the right and duty to participate in management; [2] the right and duty to act as an agent of other partners; [3] exposure to liability; [4] the fiduciary relationship among partners; [5] use of the term "co-owners" to indicate each partner's "power of ultimate control;" [6] participation in profits and losses; [7] investment in the firm; [8] partial ownership of firm assets; [9] voting rights; [10] the aggrieved individual's ability to control and operate the business; [11] the extent to which the aggrieved individual's compensation was calculated as a percentage of the firm's profits; [12] the extent of that individual's employment security; and [13] other similar indicia of ownership.

Ibid. (footnotes and citations omitted). Without otherwise explaining how the enumerated factors apply to Simpson, the court concluded that "[w]ithin the embrace of the foregoing criteria * * * the plaintiff does not qualify as a partner." *Id.* at 11a.

Judge Daughtrey filed a separate opinion concurring in the result in order "to encourage the legislative branch of our federal government to recognize as well that the realities of today's global

marketplace *no longer* justify distinguishing between 'employees' and 'partners' in all instances." App., *infra*, 14a (emphasis added). She elaborated:

> In an era of small, closely-operated partnerships, it may have been logical to conclude that an employer/partner could not and would not discriminate in employment decisions against himself or herself or against a close friend and business associate. In a world-wide organization like Ernst & Young that employs almost 2200 "partners," however, the nominal co-owners of the company are, by necessity, so far removed from the seat of actual power as to be subject to the reach of the invidious acts that employment discrimination statutes seek to remedy. *Only by statutory modifications redefining the class of individuals to be protected from such mistreatment* can we ensure that hiring, promotion, and firing decisions are undertaken with proper regard for the law of the land.

Ibid. (emphasis added).

REASONS FOR GRANTING THE PETITION

The Sixth Circuit has erroneously decided an issue of immense public importance. It is the first appellate court ever to hold that a member of a large professional-services partnership is in fact not a partner at all but an employee who is covered by ERISA and by a plethora of federal and state employment laws. This is an astounding result that cannot be squared with the rulings of other circuits and that will have an enormous impact on businesses that operate in the partnership form. Nor can the Sixth Circuit's decision to disregard the jurisdictional limits of these laws be justified, as Judge Daughtrey's concurrence suggests, by "the realities of today's global marketplace." Large partnerships were in existence in 1967 and 1974, when ADEA and ERISA were enacted; in any event, it is for Congress, not the courts, to "redefin[e] the class of individuals to be protected" by federal statutes. To correct the manifest errors in the court of appeals' analysis, resolve a significant intercircuit conflict, and bring much-needed clarity to this critically important area of federal law, further review is plainly warranted.

I. THE ISSUE PRESENTED IS RECURRING AND OF ENORMOUS PUBLIC IMPORTANCE

The Sixth Circuit has set forth an unprecedented test for determining whether a member of a professional-services firm that is organized in the partnership form may seek redress as an "employee" under two important federal statutes — ADEA and ERISA — as well as under state age discrimination laws that similarly extend protections only to "employees." Applying that test, the court of appeals concluded that a member of Ernst & Young, a well-established partnership with nationwide operations, is in reality an "employee" who is entitled to recover a multimillion dollar judgment against his former partners. This decision raises issues of profound importance to innumerable partnerships operating across the country.

To begin with, it cannot seriously be disputed that the question whether ERISA and ADEA regulate the conduct of professional-services partnerships in relation to firm members is an important and recurring question of federal law. In 1992, there were approximately 253,000 partnerships in the services industry in the United States. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 545 (115th ed. 1995) ("STATISTICAL ABSTRACT"). Those partnerships included more than 2.1 million individual partners. *Ibid.* The applicability of ERISA alone is likely to have an enormous and wholly unexpected financial impact on these firms, which might be confronted with massive new pension liabilities under the Sixth Circuit's approach.[4] Also of great importance is the question whether ADEA regulates the decisions of partnerships in adding lateral partners, separating existing partners, determining early-retirement policies, allocating firm profits among partners, and otherwise determining the "terms, conditions, or privileges" of partners' "employment." 29 U.S.C. § 623(a)(1). The practical significance of these issues

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[4] Respondent's attorney has already been quoted as saying that the Sixth Circuit's decision leaves Ernst & Young (and presumably all similarly situated partnerships) with "huge exposure" under ERISA, because it means that Ernst & Young "has the same ERISA vesting and funding obligations to partners regarding retirement plans as it does to employees." PUBLIC ACCOUNTING REPORT 7 (Nov. 15, 1996).

is persuasively illustrated by this case, which resulted in a judgment of almost $4 million against a firm that has operated in the partnership form (through its predecessor firms) for more than 90 years.[5]

What is more, the significance of the legal issue resolved by the Sixth Circuit extends far beyond ADEA, ERISA, and Ohio's age discrimination law. ADEA and ERISA are but two of the many federal employment laws that confer protections on "employees" but not on partners. For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), prohibits discrimination against "employees" on the basis of race, religion, sex or national origin. The Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), prohibits employers from paying differing wages to "employees" on the basis of their sex. The Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a), makes it unlawful to discriminate against disabled "employees" or against prospective "employees" who are otherwise qualified for a job. And the Family and Medical Leave Act, 29 U.S.C. §§ 2611(3), 2612(a)(1), 2617, confers certain rights to take leave on "employees." Thus, the employee/partner distinction is critical to the applicability of a wide array of federal employment provisions.[6]

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[5] Not surprisingly, 11 large law firm partnerships filed a joint *amicus curiae* brief in the Sixth Circuit pointing out the significance of the partner/employee issue and arguing that Simpson does not qualify as an employee under ADEA and ERISA.

[6] The boundary between employees and partners also defines the jurisdictional reach of numerous other federal statutes that do not regulate employment discrimination. For example, the Occupational Safety and Health Act, 29 U.S.C. §§ 652(6), 654, imposes certain obligations on employers with respect to their "employees." Similarly, employers are required to pay social security and federal unemployment taxes and to withhold income taxes for their "employees." 26 U.S.C. §§ 3121(d), 3306(i), 3401(c). (Simpson, in contrast, was not subject to withholding and paid his own self-employment tax, as partners are required to do under the federal tax laws. 12/7/93 Tr. 93-94, 102-103.) The concept of "employee" is thus a pervasive one in federal law.

The implications of the Sixth Circuit's resolution of the partner/employee issue for liability under *state* law also reaches well beyond Ohio Rev. Code Ann. § 4101.17 (Anderson 1989).[7] Ohio's age discrimination law is hardly unique or even unusual: most states prohibit age discrimination in one form or another. See A. RUZICHO & L. JACOBS, LITIGATING AGE DISCRIMINATION CASES § 1:19-1:71 (1996). In addition, most states have enacted general employment discrimination laws that parallel Title VII. M. ROTHSTEIN, ET AL., EMPLOYMENT LAW, at 191-92 (1994). And "[a]ll 50 states, the District of Columbia, and Puerto Rico have adopted in some form laws prohibiting discrimination in employment based on disability." I B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 266 (3d ed. 1996). Like the federal employment discrimination provisions described above, these state laws typically apply only to "employees." Accordingly, resolution of the issue presented in this case has the potential to determine the reach of a vast body of state law.

Furthermore, the question whether an individual qualifies as a *bona fide* partner arises under federal employment discrimination laws in contexts other than determining who is a proper plaintiff. For example, liability under many federal statutes is not triggered unless an employer has a minimum number of employees. See, *e.g.*, 42 U.S.C. § 2000e(b) (Title VII) (15 or more employees); 29 U.S.C. § 530(b) (ADEA) (20 or more employees). See *Walters* v. *Metropolitan Educational Enterprises, Inc.*, 117 S. Ct. 660 (1997). Courts must resolve the question whether members of a firm qualify as *de facto* employees in deciding whether a particular business entity is of sufficient size to be subject to these laws. See, *e.g.*, *Burke* v. *Friedman*, 556 F.2d 867 (7th Cir. 1977). Thus, an unduly permissive test of "employee" status will have the effect of extending the employment discrimination laws to entities that Congress never intended to cover.

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[7] The Sixth Circuit's resolution of the partner/employee issue under Ohio law was inextricably bound up with its resolution of that issue under ERISA and ADEA. Indeed, the Sixth Circuit treated the issue as identical under all three statutes. A reversal of the Sixth Circuit's interpretation of ADEA and ERISA accordingly would call for a remand to the Sixth Circuit to reconsider its decision as to Ohio law.

The same issue also arises in employment discrimination lawsuits brought not against partnerships but against *professional corporations*. In that context, the corporation sometimes argues that its shareholders or directors — often lawyers, accountants, physicians, or other professionals — may not bring suit as "employees" under federal employment provisions because they are *de facto* partners. See, *e.g.*, *Hyland* v. *New Haven Radiology Associates, P.C.*, 794 F.2d 793 (2d Cir. 1986). In other cases, the professional corporation argues that its shareholders are *de facto* partners in order to demonstrate that it lacks the requisite number of employees to trigger application of the employment laws. See, *e.g.*, *EEOC* v. *Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984). The cases involving professional corporations are indistinguishable from those involving partnerships, except that it is the *defendant*, not the plaintiff, who asks the court to disregard an organizational form that has been freely chosen and to recharacterize employment status on the basis of various subjective factors.

As if all of that were not enough, empirical trends enhance the practical significance of the issue presented in this case. Professional-services partnerships in this country are growing in size. Between 1980 and 1992, the average size of such partnerships more than doubled. See STATISTICAL ABSTRACT, at 545. As Judge Daughtrey correctly noted, the "era of small, closely-operated partnerships" is a thing of the past. App., *infra*, 14a. See Sikora, *Statutory Protection for the Discriminatorily-Discharged Partner: Two Recent Decisions*, 13 U. DAYTON L. REV. 311, 312 (1988) (noting "the growth of large, service-oriented partnerships" in recent years). This growth in partnership size makes it inevitable that more and more firms will adopt the kind of sensible internal structures — such as a centralized management committee to which the partners delegate substantial decisionmaking authority — that are already commonplace and that the Sixth Circuit concluded had the effect of transforming Simpson into a *de facto* "employee." These trends will also render even more misguided the assumption — reflected in the Sixth Circuit's analysis — "that a 'true' general partnership operates like a New

England Town meeting." *Wheeler* v. *Main Hurdman*, 825 F.2d 257, 273-74 (10th Cir.), cert. denied, 484 U.S. 986 (1987).[8]

Finally, we note that the Sixth Circuit's resolution of the partner/employee issue is especially significant because, to our knowledge, it represents the first time that an appellate court has ever upheld the imposition of liability under the federal employment discrimination and pension laws against a large, established professional partnership based upon the partnership's treatment of a member of the firm. The Sixth Circuit's decision to affirm a multimillion dollar judgment against Ernst & Young is certain to spur many other partners nationwide to challenge decisions concerning the separation or early retirement of partners, the failure to hire lateral partners, the allocation of partnership profits, the funding of pension plans, and a host of other matters that relate to the "terms, conditions, or privileges" of a partner's "employment." The practical importance of this case for large law, accounting, consulting, medical and other partnerships is therefore enormous.[9] It plainly warrants this Court's attention.

II. THE SIXTH CIRCUIT'S HOLDING IS INCONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS

The Sixth Circuit resolved the important issue presented in this case in a manner that conflicts with the decisions of other circuits. See, *e.g.*, Pokora, *Partners As Employees Under Title*

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[8] Although the average size of professional-services partnerships continues to rise, large partnerships engaged in the provision of legal, accounting, or other professional services were an established (and highly visible) feature of the economic landscape at the time that ADEA and ERISA were enacted. For example, petitioner's two predecessor firms each had approximately 200 partners in 1967. See also Wise, *The Auditors Have Arrived*, FORTUNE 151, 152 (Nov. 1960) (in 1960, seven of the "Big Eight" accounting firms had more than 100 partners).

[9] The Sixth Circuit's decision is also likely to have a detrimental impact on third parties. Specifically, the court's casual suggestion (App., *infra*, 10a n.2) that partners who are determined to be *de facto* "employees" might escape liability for the actions of other partners interjects grave uncertainty into the dealings of third parties with partnerships such as Ernst & Young. See also page 30, *infra*.

VII: The Saga Continues, 22 OHIO N.U. L. REV. 249, 250 (1995) (noting that courts have "com[e] to various conclusions" in deciding whether partners may qualify as employees); Outen & Rasner, 2 LAW FIRM PARTNERSHIP & BENEFITS REPORT 4 (Sept. 1996) (stating that "[a] split has emerged in the federal circuits" over whether members of a professional corporation are in fact "partners" outside the coverage of the antidiscrimination laws); Sikora, *supra*, 13 U. DAYTON L. REV. at 328 (noting "present split in the federal courts on classification of partners"). It is essential that this Court resolve the conflict and restore uniformity to this critical area of federal law.

In ruling that Simpson was merely an Ernst & Young "employee," the Sixth Circuit explained that it was "evaluat[ing] the undisputed facts of the instant case against the common-law principles as codified in the UPA." App., *infra*, 10a (footnote omitted). The court of appeals then proceeded to list more than a dozen factors (several of which contain more than one element) that must be analyzed in order to determine whether a nominal partner is in fact an employee. See page 8, *supra*. Having listed these numerous factors, the court summarily concluded that "[w]ithin the embrace of the foregoing criteria, * * * plaintiff does not qualify as a partner." App., *infra*, 11a.

The Sixth Circuit's multi-factor approach to assessing partnership status is at odds with the views of other circuits. The courts of appeals have addressed this issue in three different ways. One approach, adopted by the Second and Eleventh Circuits, is to treat as dispositive the organizational choice of co-venturers (whether partners or shareholders in a professional corporation). A second approach, adopted by the Seventh and Tenth Circuits, is to accord substantial deference to organizational choice while examining, at most, a few key attributes of partnership status. A third approach, adopted recently by the Eighth and Ninth Circuits, is to focus on several attributes while affording no deference to the choice of organizational form. The Sixth Circuit has joined the third group with a vengeance, ruling that courts must examine a lengthy list of factors supposedly derived from the common law and the Uniform Partnership Act.

1. *Organizational Choice As Dispositive.* The conflict is most pronounced with a line of Second Circuit decisions that

categorically refuse to look behind the form of business organization chosen by co-venturers. Thus, in *Hyland* v. *New Haven Radiology Associates, P.C.*, 794 F.2d 793 (1986), the Second Circuit rejected a professional corporation's argument that a discharged physician was in reality a partner excluded from coverage under ADEA. The Second Circuit also rejected the contention that the plaintiff's status as a partner or employee should be evaluated by "consideration of numerous circumstances relating to the work relationship," holding that "the use of the corporate form precludes *any examination* designed to determine whether the entity is in fact a partnership." *Id.* at 797-98 (emphasis added). "The fact that certain modern partnerships and corporations are practically indistinguishable in structure and operation," the court explained, "is no reason for ignoring a form of business organization freely chosen and established." *Id.* at 798. Accord *Johnson* v. *Cooper, Deans & Cargill, P.A.*, 884 F. Supp. 43, 45 (D.N.H. 1994) (following *Hyland*); *Gorman* v. *North Pittsburgh Oral Surgery Associates*, 664 F. Supp. 212, 214 (W.D. Pa. 1987) (same).

The Second Circuit recently reaffirmed its holding in *Hyland*. See *EEOC* v. *Johnson & Higgins, Inc.*, 91 F.3d 1529, 1538 (2d Cir. 1996). In dismissing the argument of Johnson & Higgins (J&H) that its mandatory retirement policy for members of the company's Board of Directors could not be challenged under ADEA because J&H directors were "*de facto* partners" rather than employees, the court of appeals reiterated its view that it would be improper for a federal court to "'ignor[e] a form of business organization freely chosen and established'" by co-venturers. *Id.* at 1537 (quoting *Hyland*, 794 F.2d at 798). The Second Circuit accordingly rejected as "without merit" J&H's argument that it should "assess whether J&H's owner-director-officers should be treated as partners or employees" by examining their actual role in the company in light of "common law" principles. 91 F.3d at 1538. The Second Circuit's cases are directly at odds with the Sixth Circuit's reasoning in this case.

The Eleventh Circuit's view of the partner/employee issue is similar to the Second Circuit's. In *Hishon* v. *King & Spalding*, 678 F.2d 1022 (1982), rev'd, 467 U.S. 69 (1984), a Title VII suit for sex discrimination brought by an associate who was denied

partnership at a large Atlanta law firm, the plaintiff advanced a number of arguments to support jurisdiction under Title VII, including that (1) King & Spalding partners were equivalent to "employees" (so that elevation from associate to partner was tantamount to an ordinary promotion occurring in the employment relationship); and (2) as an associate, plaintiff qualified as an "employee," and her elevation to partnership was an "employment opportunity" or a "term, condition, or privilege of employment" protected by Title VII. *Id.* at 1026 & n.7. The Eleventh Circuit rejected both arguments.

The Eleventh Circuit acknowledged that "large law partnerships possess many attributes common to corporate forms of business," but it disagreed that these features transformed King & Spalding partners into *de facto* employees. 678 F.2d at 1026. The Eleventh Circuit explained its general "reluctance" to "equate partners with employees" (*id.* at 1028) — even in a large law firm such as King & Spalding with a centralized management structure — as follows:

> King & Spalding operates as a partnership under the laws of Georgia. It files tax returns as a partnership. It is comprised of fifty active partners and employs approximately fifty associates along with other support personnel. It has a lengthy partnership agreement with detailed provisions as to profits, losses, withdrawal, dissolution, etc. *But it is clearly a voluntary association of lawyers for the purpose of practicing law as joint venturers.* The partnership is the appellant's employer; the partners own the partnership; they are not its "employees" under Title VII.
>
> We find a clear distinction between employees of a corporation and partners of a law firm. In making this distinction, we do not presume to exalt form over substance. In this instance, however, *the form is the substance*, and we are unwilling to dictate partnership decisions under the guise of employee promotions protected by Title VII.

Ibid. (emphasis added). This reasoning cannot be squared with the Sixth Circuit's analysis in this case. See also *Holland* v. *Ernst & Whinney*, 35 Empl. Prac. Dec. (CCH) ¶ 34,653 (N.D. Ala. Aug.

17, 1984) (rejecting argument that partner was employee without examination of partner's actual role).

This Court reversed the Eleventh Circuit's ultimate determination that Title VII does not apply to claims by an associate based on alleged sex discrimination in the partnership decision, see *Hishon* v. *King & Spalding*, 467 U.S. 69 (1984), but it did so by accepting only the plaintiff's *second* theory — that, as an associate, she was an "employee" entitled to bring suit under Title VII. The Court expressly declined to reach (467 U.S. at 74 n.4) her alternative basis for jurisdiction: the argument that King & Spalding partners were *de facto* employees. The Eleventh Circuit has specifically acknowledged that this Court's reversal in *Hishon* did not undermine its analysis of the partner/employee issue. See *Fountain* v. *Metcalf, Zima & Co., P.A.*, 925 F.2d 1398, 1399-1400 (11th Cir. 1991); accord *Wheeler* v. *Main Hurdman*, 825 F.2d 257, 264 (10th Cir.), cert. denied, 484 U.S. 986 (1987).[10]

Although the Court in *Hishon* did not reach the question whether a law firm partner could qualify as an employee under Title VII, Justice Powell filed a concurring opinion in which he took pains to point out that "the Court's opinion should *not* be read as extending Title VII to the management of a law firm by its partners" or as suggesting "that the relationship among partners be characterized as an 'employment' relationship to which Title VII

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[10] In *Fountain*, the Eleventh Circuit concluded that an accountant who was a member/shareholder of a professional corporation was more akin to a partner than to an employee and thus was barred from suing under ADEA. 925 F.2d 1398. The Eleventh Circuit determined that the member/shareholder's status should be based on "the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control, and ownership." *Id.* at 1400-01. In so holding, the Eleventh Circuit expressly disagreed with the Second Circuit's decision in *Hyland*, which the Eleventh Circuit interpreted as "exalt[ing] * * * form over substance" by making resolution of this issue turn solely on what "label" is attached to a claimant. *Id.* at 1400. Although the Eleventh Circuit looked for guidance to its previous *Hishon* decision construing Title VII, it treated the ADEA issue as one of "first impression" because it involved a different statute. *Id.* at 1399-1400.

would apply." 467 U.S. at 79 (Powell, J., concurring) (emphasis added). On the contrary, Justice Powell explained, "[t]he relationship among law partners differs markedly from that between employer and employee — including that between the partnership and its associates." *Ibid.* In a footnote, Justice Powell observed that "[o]f course, an employer may not evade the strictures of Title VII *simply by labeling* its employees as 'partners.'" *Id.* at 79 n.2 (emphasis added). Justice Powell's opinion thus strongly suggests that partners in law firms may not sue as "employees" under the federal employment discrimination laws unless the partnership is merely a sham entity created for the purpose of avoiding the application of such statutes.

2. *Deferential Assessment of Factors.* Consistent with Justice Powell's opinion in *Hishon*, the Seventh and Tenth Circuits have refused to engage in the kind of intrusive second-guessing of partnership arrangements endorsed by the Sixth Circuit in this case. Instead, those circuits have accorded substantial deference to partners' choice of the partnership form, while examining a few key attributes of partnership status to ensure that the partnership is not a sham.

In *Wheeler* v. *Main Hurdman*, the Tenth Circuit refused to recharacterize a partner in a large national accounting firm (with more than 500 partners) as an "employee" within the meaning of various federal employment statutes, including ADEA and Title VII. See 825 F.2d at 264-77. In so holding, the court rejected a proposed multi-factor "economic realities test" for assessing partnership status as too indeterminate and as reflecting the mistaken "assumption * * * that a 'true' general partnership operates like a New England Town meeting." *Id.* at 273-74.[11] The Tenth Circuit explained (*id.* at 273 (citation omitted)):

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[11] The Tenth Circuit thus rejected a test virtually identical to that endorsed by the Sixth Circuit in this case: "The heart of the standard proposed to us is a theory that any individual who is organizationally or economically dominated is an employee. * * * With due respect, those arguments and assumptions are not likely to translate to the real world with any discernible limits." *Main Hurdman*, 825 F.2d at 273.

> Partnerships, as Justice Powell so aptly stated in his concurring opinion in *Hishon*, embody very special relationships and sensitive management concerns *inter se*; however, *de facto* "domination" or "control" of work, clients, billings, and compensation by key partners may be more common than not, and size of the partnership is not necessarily the determinative factor. * * * "Domination" of a partner in assignment and supervision of work, billing, share of profits, and other matters can result from a myriad of wholly practical reasons existing from time to time in any partnership. Furthermore, a certain amount of "domination" may flow from the necessity of an organizational structure even in the smallest partnership. When the EEOC asserts that status depends upon the "individual's ability actually to control factors such as the management of the firm and critical elements of his or her work," we must wonder just how many partners the "actual control" requirement describes in the real world, and if any partnership of any duration would not have employee partners. What the EEOC and Wheeler are describing as true partners are sole proprietors and a limited number of dominant partners nationwide.

Notably, the Tenth Circuit also faulted any test that focuses on "economic realities" as overlooking the fundamental fact that "[p]artner status is supported by agreement — written, oral, or implied — and statutes." 825 F.2d at 274. "Thus," the court reasoned, "'domination' of a partner may consist not of an absence of rights, as with an independent contractor, but of an *abdication* of rights, which may or may not be a temporary submissiveness." *Ibid.* (emphasis added). In addition to stressing the importance of partners' choice of organizational form, the Tenth Circuit stated that it was a "fatal flaw" to overlook the critical importance of partners' liability for acts of the partnership. *Ibid.* "It is no small thing," the court explained, "to be exposed to unlimited liability, to be personally at risk for a partner's mistakes, and to have one's share of profits always potentially conditional upon the outcome of claims, suits and obligations generated by another partner." *Ibid.* While the Tenth Circuit did cite various general characteristics of the particular accounting firm in concluding that Wheeler could not sue as an employee, it did so merely to show that the partnership

was not a sham and that Wheeler was, in fact, a "*bona fide* general partner[]." *Id.* at 277; accord *Maher* v. *Price Waterhouse*, 1985 WL 9500 (E.D. Mo. 1985).[12]

Like the Tenth Circuit, the Seventh Circuit has applied far less exacting judicial scrutiny to the chosen partnership form in resolving issues similar to those presented here. In *Burke* v. *Friedman*, 556 F.2d 867 (1977), the Seventh Circuit considered whether an accounting partnership with four partners and 13 employees was subject to Title VII, which applies only to employers with 15 or more employees. It concluded that, because the partners "manage and control the business and share in the profits and losses" (*id.* at 869), "we do not see how [they] can be regarded as employees rather than as employers who own and manage the operation of the business." *Ibid.*; see also *Hishon*, 678 F.2d at 1028 (noting Seventh Circuit's "hesitation to equate partners with employees"). Accord *EEOC* v. *Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984) (treating attorney-shareholders in professional corporation as "partners" because of the general similarity in their economic circumstances to that of law partners).[13]

3. *Non-Deferential Assessment of Factors.* In two recent decisions, the Eighth and Ninth Circuits have indicated that they

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[12] Even if *Main Hurdman* can be interpreted as focusing on various "common law" attributes of partnership, it is apparent from the result in that case that the Tenth Circuit takes a much broader view of partner status than did the Sixth Circuit here. The accounting partner in *Main Hurdman* was functionally indistinguishable from Simpson (see 825 F.2d at 260-61); yet the Tenth Circuit rejected the argument that she was an employee covered by Title VII and ADEA.

[13] The Sixth Circuit sought to distinguish *Burke*, *Dowd & Dowd*, and *Hyland* on the ground that "[n]one of these cases question[s] the plaintiff's ownership participation in the employing entity." App., *infra*, 11a n.3. But it is precisely because the Second and Seventh Circuits were unwilling to recharacterize the status of co-venturers that they declined to undertake the kind of judicial second-guessing engaged in by the court below. See also *Main Hurdman*, 825 F.2d at 272 n.30 (rejecting similar effort to distinguish *Burke* and *Dowd & Dowd*).

will assess partnership status by evaluating the "substance of the employment relationship" and the "actual duties and role of the individual." *Devine* v. *Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 81 (8th Cir. 1996), petition for cert. filed, 65 U.S.L.W. 3632 (Mar. 7, 1997) (No. 96-1423); *Strother* v. *Southern California Permanente Medical Group*, 79 F.3d 859, 867 (9th Cir. 1996) (court will "analyze the true relationship among partners").[14] Unlike the Sixth Circuit, however, the Eighth and Ninth Circuits focus on a limited number of critical partnership criteria. Thus, in *Devine*, the Eighth Circuit, although purporting to endorse an approach that examines "all relevant factors," focused on whether the individuals in question were compensated "based on the firms's profits," bore "responsibility for firm debts," participated in the management and "set firm policy," and made "contributions to firm capital." 100 F.3d at 82. Similarly, in *Strother*, the Ninth Circuit examined the "the method of compensation," "the 'partner's' responsibility for partnership liabilities," and "the 'partner's' role in management." 79 F.3d at 867.[15]

Although the Sixth Circuit's decision falls generally into this third group of cases, it adds to the confusion by vastly expanding the list of factors that must be evaluated in judging partnership status. For example, in the Sixth Circuit, courts must now assess, in addition to factors examined in other circuits, "the right and

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[14] The Eighth Circuit in *Devine* acknowledged that "courts have taken two approaches" to this issue, but expressly declined to follow the Second Circuit's approach in *Hyland* and *Johnson & Higgins*, according to which the choice of organizational form "is decisive." 100 F.3d at 80; compare *id.* at 82 (Heaney, J., dissenting) (endorsing the rule of *Hyland*).

[15] Even the factors that the Sixth Circuit's approach has in common with other circuits appear to be applied differently by those other courts. For example, the Eighth Circuit in *Devine* rejected the argument that shareholder-directors of a professional corporation were not partners merely because they were "paid a bi-monthly salary," explaining that "this is not enough to make them employees" since their total compensation was (as with Simpson) based on the firm's profits. 100 F.3d at 81. Similarly, the Eighth Circuit noted that while "the ability to participate in firm policy" was an "important factor" in the analysis, "[p]articipation rights" of partners "need not be equal." *Ibid.*

duty to act as an agent of other partners," "the fiduciary relationship among partners," the extent of "employment security," and — most oddly, given its view that mere labels are not significant — the "use of the term 'co-owners' to indicate each partner's 'power of ultimate control[]'." App., *infra*, 10a.

In sum, the Sixth Circuit's decision adopts a far narrower definition of partnership than exists in the Second, Seventh, and Tenth Circuits (and the Eleventh Circuit in Title VII cases). And while the Eighth and Ninth Circuits agree with the Sixth Circuit that the partner/employee issue must be resolved by weighing the actual role of the individual in question, in making that determination they focus on fewer and more basic criteria than the laundry list of factors purportedly examined by the court below. Because the Sixth Circuit's decision conflicts with that of other circuits, this Court's intervention is needed to assure the uniformity of federal law. There is simply no good reason why a partnership that operates in Michigan, Ohio, or Tennessee should be subject to a wide array of new federal requirements and liabilities that would not apply to that partnership in Colorado, Illinois or New York.

This divergence in approach imposes an especially intolerable burden on partnerships, such as Ernst & Young, that conduct business in offices located throughout the United States.[16] Because of the potential for significant exposure to liability, such partnerships might well be forced to conform their operations to the Sixth Circuit's standard nationwide, even though the very same employment statutes have been held *not* to apply to their operations in other circuits. Moreover, the Sixth Circuit's indeterminate approach leaves partnerships with great uncertainty over whether their pension plans for partners are now subject to a myriad of complex ERISA requirements relating to funding, vesting, recordkeeping, and the like, as well as over how to handle withholding and payroll taxes for firm "partners." It is essential that the Court eliminate this uncertainty and confusion.

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[16] Ernst & Young has offices in 38 states and the District of Columbia.

III. THE SIXTH CIRCUIT'S ANALYSIS IS INCORRECT

These untoward results should not be suffered, because the Sixth Circuit's construction of ADEA and ERISA is clearly misguided. The court of appeals was mistaken not only in its general approach to the jurisdictional issue, but also in its analysis of the many factors that it regarded as the *sine qua non* of partnership status. And the Sixth Circuit was egregiously wrong in its ultimate conclusion that Simpson qualified as an "employee."[17]

To understand the flaw in the court of appeals' analysis, it is useful, at the outset, to clarify what is *not* disputed in this case. There is no dispute that ADEA and ERISA cover "employees" only and therefore exclude *bona fide* partners. Like other courts, the Sixth Circuit endorsed this indisputable proposition of law. App., *infra*, 9a. It is of course perfectly sensible that Congress would have excluded partners from the coverage of these statutes. Partners are co-owners of a business who are jointly engaged in an entrepreneurial venture. The federal employment laws were never intended as a vehicle for co-owners to resolve disputes over how to conduct their business.

Equally beyond dispute is the notion that the requirements of ADEA and ERISA cannot be avoided through the simple expedient of creating a sham partnership whereby employees are labeled "partners." Otherwise, any employer could exempt its employees from the protections of the federal employment discrimination laws merely by changing their job titles.

Once these two propositions are accepted, the only remaining question is how courts should go about determining whether an individual who bears the title "partner" is nonetheless an employee. To answer that jurisdictional question, the Sixth Circuit considered a long list "of common-law principles" that have been

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[17] This is not to say that Simpson was without legal recourse if he believed that he was unfairly treated. He could have brought a variety of claims against Ernst & Young under state partnership and contract law, including claims for breach of fiduciary duty and breach of contract. See, *e.g.*, *Smith* v. *Brown & Jones*, 167 Misc.2d 12, 20-21, 633 N.Y.S.2d 436, 442 (1995); *Birnbaum* v. *Birnbaum*, 73 N.Y.2d 461, 466, 539 N.E.2d 574, 576, 541 N.Y.S.2d 746, 748 (1989).

"codified in" the Uniform Partnership Act (UPA) and that, in the court's view, describe the features common to most if not all partnerships. App., *infra*, 10a; see also *id.* at 40a-43a. That approach was mistaken for a number of reasons.

To begin with, the Sixth Circuit's approach is far too demanding. It should be enough, in a case such as this, for a partnership to demonstrate that (1) it is not a sham partnership (created for the purpose of evading the laws governing "employees") and that (2) the plaintiff enjoyed the rights of the other "partners" in the firm. Under that test, Simpson certainly qualified as a partner. The Sixth Circuit did not take issue with the facts that (i) Ernst & Young, the product of a merger of two partnerships that were formed in 1903 and 1906, is a *bona fide* general partnership; (ii) the Ernst & Young partnership agreement, and the governance structure it created, fully comply with New York partnership law; and (iii) Simpson was afforded all of the rights and duties that belonged to other Ernst & Young partners under the partnership agreement. In requiring more of Ernst & Young, the court below simply disagreed with the way in which the partners in Ernst & Young chose voluntarily to govern themselves.[18] It was wholly inappropriate, and contrary to the approach followed by other appellate courts, for the Sixth Circuit to second-guess that business judgment. See, *e.g.*, *Hyland*, 794 F.2d at 798 (refusing to second-guess a "form of business organization freely chosen and established"); *Hishon*, 678 F.2d at 1028 (same); *Holland* v. *Ernst & Whinney*, *supra* (same).

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[18] The fact that Simpson and the other signatories of the Ernst & Young partnership agreement — like partners in most large law and accounting firms — delegated certain of their powers of self-governance to particular *offices and governing committees*, filled by individual partners, does not detract from this conclusion. Because partner compensation, the capital placed at risk by individual partners, and the personal liability of partners for the firm's losses all hinged on whether the partnership as a whole was profitable (which required that it be operated efficiently), it is hardly surprising that Ernst & Young partners elected to structure their affairs in this manner. The Sixth Circuit, however, simply disregarded the many advantages accruing to Simpson and other Ernst & Young partners from this feature of the partnership agreement.

In any event, even if it were appropriate for the Sixth Circuit to insist that all partnerships contain certain essential attributes, the court's reliance on a laundry list of common-law factors drawn from the UPA is indefensible. *First*, it ignores the central, overriding characteristic of the partnership form under the common law: flexibility. Partnerships are, after all, the creature of agreements among partners. And partners have an almost unlimited ability to alter their rights and duties by agreement. See generally A. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP § 1, at 4 (1968) ("[T]he most important [feature of partnership] is malleability: the relations among the partners and the internal structure of the firm can be anything the partners want. Their agreement is determinative * * * ."). This is equally true under New York partnership law. See *Lanier* v. *Bowdoin*, 24 N.E.2d 732, 735 (N.Y. 1939). In view of the almost infinite variety of the partnership form, it makes utterly no sense to test the status of every partner against a lengthy list of supposed attributes of all *bona fide* partners.

Second, and relatedly, the Sixth Circuit's analysis rests on a misunderstanding of the UPA. Approved by the Commissioners of Uniform State Laws in 1914 (and adopted by New York in 1919), the UPA "serves as a 'standard form' contract, which controls the rights and duties among the partners *in the absence of contrary agreement*." II A. BROMBERG & L. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 6.01(b), at 6:2 (1996) (emphasis added). In other words, the UPA's provisions are nothing more than a series of *default rules* that "are largely subject to alteration by the partnership agreement." *Id.* § 6.01(c), at 6:3; UPA § 18 (stating that, with certain limited exceptions, the "rights and duties of the partners" are "subject to any agreement between them"); New York Partnership Law § 40 (McKinney 1988 & Supp. 1997) (same). The New York Court of Appeals has acknowledged that New York's partnership law provides default rules "applicable only in the absence of an agreement between the partners on the same subject matter." *Lanier*, 24 N.E.2d at 734-35. Once it is recognized that the UPA embodies default rules rather than "common-law principles" embodied in every legitimate partnership, the error of the Sixth Circuit's analysis is plain.

Third, the Sixth Circuit failed to apprehend that even the default rules included in the UPA are not necessarily representative of all or even most partnerships today. The UPA was approved in 1914 during "an era of small, closely-operated partnerships." App., *infra*, 14a (Daughtrey, J., concurring). See II A. BROMBERG & L. RIBSTEIN, *supra*, § 6.02(b), at 6:9. Consistent with that model, the "U.P.A. standard form is * * * based on the *concept of equality*: Partners share equally in the profits of the business (U.P.A. § 18(a)) and in management (§18(e))." II A. BROMBERG & L. RIBSTEIN, *supra*, § 6.01(b), at 6:2-6:3 (emphasis added). Of course, what was representative of partnerships in 1914 is not necessarily common practice today. Moreover, even under the UPA partners remain perfectly free to depart from the rule of equality, and in fact "[t]he equal sharing rule is often altered by the partnership agreement, particularly in professional firms (such as law firms), in which there may be wide variations in the partners' individual contributions to firm profits." *Id.* § 6.02(b), at 6:11. For this reason as well, the Sixth Circuit erred in treating the provisions of the UPA as reflecting pervasive "common-law principles" rather than default rules subject to modification by parties to any partnership agreement.

Fourth, the Sixth Circuit's test is unworkable, because it consists of no fewer than 12 separate factors, many of which are themselves comprised of several subcomponents. See *Walters* v. *Metropolitan Educational Enterprises*, 117 S. Ct. 660, 665 (1997) (rejecting definition of "employee" that would make Title VII's coverage depend upon an "incredibly complex and expensive factual inquiry"); *id.* at 664 (stating that "Congress should be thought to have prescribed" an approach to the jurisdictional issue that is "impossible to administer" "only if the language could bear no other meaning").[19] The uncertainty caused by the Sixth Circuit's test is compounded, moreover, by the court's vague and unelaborated statement that the list is not exhaustive and may be

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[19] Notably, the jury at the separate trial on the employee/partner issue deadlocked when faced with the task of applying a similar multi-factor test, because (as it explained in a note sent to the judge during deliberations) it could not agree on what weight to give to the many factors it was directed to consider. See 12/10/93 Tr. 559-563; 12/14/93 Tr. 2, 17.

supplemented by "other similar indicia of ownership." App., *infra*, 10a. As the Tenth Circuit explained in rejecting a similar multi-factor test:

> A potentially chaotic situation is presented with partners drifting into and out of covered "employee" status, remaining partners all the while, with no one ever quite knowing who is an employee/partner and who is a "pure" partner.

Main Hurdman, 825 F.2d at 274. Judge Daughtrey's separate concurrence only adds to the confusion because it suggests that current law is ambiguous and in need of revision by Congress, apparently in light of economic developments since ADEA and ERISA were enacted. But see note 8, *supra*.

This Court's decision in *Nationwide Mutual Ins. Co.* v. *Darden*, 503 U.S. 318 (1992), provides no support for the panel's indeterminate approach. To be sure, the Court in *Darden* adopted "a common-law test" for distinguishing employees from independent contractors under ERISA. But as the Sixth Circuit acknowledged, *Darden* adopted a "traditional agency test" that is "directed to the independent contractor/employee issue." App., *infra*, 9a. See also *id.* at 40a. The distinction between independent contractors and employees "arose under the common law in deciding whether a principal was liable under *respondeat superior* for the torts of his agent: such liability attached if the agent was an employee, but not if he was an independent contractor." M. ZIMMER, ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION, at 520 (3d ed. 1994). "Factors employed for that purpose are useless for drawing lines between people who are part of the same enterprise." *Hyland*, 825 F.2d at 272; accord *Devine*, 100 F.3d at 81 n.4.

In addition, the test outlined in *Darden* involved reference to a number of relatively straightforward objective factors, many of which were subject to ready determination — for example, whether the worker in question provided his own tools, the location of the work, the duration of the employment relationship, the method of payment, and the tax treatment of the hired party. 503 U.S. at 323, 327. Indeed, the Court expressly rejected an alternative approach (which included consideration of the worker's "economic bargaining position" vis-a-vis the employer) on the ground that it

would "severely compromise the capacity of companies * * * to figure out who their 'employees' are and what, by extension, their pension-fund obligations will be." *Id.* at 327.

For these reasons, the Sixth Circuit's approach was completely misguided. In determining Simpson's status, the court of appeals should have inquired whether he enjoyed the rights of other partners in a *bona fide* partnership. Under that approach, Simpson certainly qualified as a partner in Ernst & Young, as he represented himself to be in his dealings with clients and the IRS, and not as an employee. Moreover, the same result follows even if one focuses on the key indicia of partnership status.

Sharing in Profits. The Sixth Circuit relied on the district court's conclusion that Simpson had "no share in the profits" of Ernst & Young. App., *infra*, 7a; see also *id.* at 6a. The district court, in turn, relied on the fact that Simpson's compensation consisted of both a monthly "salary" and an annual "allocation" (*id.* at 48a-49a) and the annual allocation was determined by the Management Committee on the basis of such factors as performance, level of responsibility, and years of service. *Id.* at 32a. It also attached significance to the absence in the Ernst & Young partnership agreement of any "specific *formula* for calculating the amount of firm earnings due plaintiff," an omission the court regarded as "leaving plaintiff in the position of an employee whose amount of yearly earnings was subject to the direction of a higher authority." *Id.* at 20a (emphasis added); see also *id.* at 49a.

This analysis reflects a profound misunderstanding of the nature of the compensation decision in modern partnerships. It is common for partnerships to provide partners with periodic cash distributions. See *Hishon*, 467 U.S. at 79 n.3 (1984) (Powell, J., concurring). The testimony at trial established that the allocation provided to partners was ultimately dependent upon the firm's profits. 12/9/93 Tr. 492-493. *It is undisputed that if Ernst & Young had earned no profits in any particular year, Simpson — unlike an employee — would have received no compensation.* Simpson plainly participated in Ernst & Young's profits.

Individual Liability. The Sixth Circuit acknowledged that, by signing the Ernst & Young partnership agreement, Simpson became "jointly and individually liable for the losses of Ernst &

Young." App., *infra*, 10a n.2. Remarkably, however, the court went on to say that "it is questionable if his liability could have been enforced." *Ibid.* There is absolutely no basis for this speculation, and the court cited nothing to support it.

Capital Contribution. As an Ernst & Young partner, Simpson made a substantial capital contribution — $84,000 — to the partnership. The district court brushed this fact aside by asserting that Simpson's contribution was "more akin to a loan than a capital contribution" because Ernst & Young arranged for a bank to lend Simpson the money. App., *infra*, 47a. But it is conceded that Ernst & Young did *not* guarantee this loan and required Simpson to pay it off in a certain number of years (*id.* at 32a), and Simpson himself conceded that this money was "at risk" if the firm sustained serious losses (12/7/93 Tr. 75, 77-78).

In sum, the Sixth Circuit's decision leads to absurd results by permitting persons (such as Simpson) who were signatories to a valid partnership agreement, who indisputably considered themselves and were treated as partners, and who held themselves out as such to third parties, to bring suit against their partnership, claiming mere employee status. It also thwarts congressional will by expanding the jurisdictional reach of federal statutes to cover partners, even though Congress was surely aware of large partnerships at the time these laws were enacted. Compare *Darden*, 503 U.S. at 323 (refusing to adopt a test for "employee" that would "thwart congressional design or lead to absurd results"). Indeed, Judge Daughtrey effectively acknowledged this point in her separate concurrence by calling upon Congress to make "statutory modifications redefining the class of individuals to be protected" from employment discrimination in light of "today's global marketplace." App., *infra*, 14a. We agree completely that the decision whether to subject the governance decisions of *bona fide* partnerships to federal employment laws should be made by Congress and not by the courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

No. 95-3209

United States Court of Appeals
For the Sixth Circuit

P. LARUE SIMPSON, Plaintiff-Appellee,

v.

ERNST & YOUNG, Defendant-Appellant.

On Appeal from the United States District
Court for the Southern District of Ohio

Decided and Filed Nov. 8, 1996.

Before: KRUPANSKY, DAUGHTREY, and MOORE, Circuit Judges.

KRUPANSKY, J., delivered the opinion of the court, in which MOORE, J., joined. DAUGHTREY, J. (p. 18), delivered a separate concurring opinion.

KRUPANSKY, Circuit Judge.

This action concerns the 1990 discharge of an individual from a large accounting firm. Appellee Peyton Larue Simpson ("Simpson") sought federal judicial redress for his termination by appellant Ernst & Young ("Ernst & Young"), alleging federal claims for violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and a supplemental state claim under the Ohio law that bars age discrimination, Ohio Rev. Code § 4101.17 (Anderson 1989).

Simpson filed this lawsuit on March 25, 1991 seeking damages pursuant to ADEA, 29 U.S.C. § 621 *et seq.*, which protects employees who are forty years or older from age-based discrimination. He also sought damages pursuant to ERISA, 29 U.S.C. § 1001 *et seq.*, charging that his termination was intended to deny him participation in certain Ernst & Young retirement plans and was imposed in retaliation for his persistent inquiries

concerning his post-merger retirement benefits. Included in Simpson's complaint were causes of action for violation of the Ohio age discrimination statute, Ohio Revised Code § 4101.17 (Anderson 1989), and for unjust enrichment.

Following discovery, the parties filed cross-motions for summary judgment. Ernst & Young argued that Simpson was a partner rather than an employee of the firm; consequently, his action was not cognizable pursuant to ADEA and ERISA. The district judge to whom the case was initially assigned observed that "labeling plaintiff a 'partner' does little to illuminate the actual nature of his employment relationship with Ernst & Young." He concluded in his well-reasoned opinion of March 26, 1993 that whether Simpson was "an employee within the meaning of the ADEA," turned on "plaintiff's actual role in the management, control, and ownership of Ernst & Young,"—all disputed issues of material fact to be decided by a jury. The district judge bifurcated the case for trial with its first phase limited to determining if Simpson was an Ernst & Young "partner" or "employee." On December 6, 1993, the parties consented to a trial and entry of final judgment of all issues in the case by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

Following the parties' consent order, a four-day jury trial before the court deadlocked, and resulted in a mistrial on December 20, 1993. The parties thereafter agreed to resubmit the case on cross-motions for summary judgment addressing the "partner versus employee" issue upon the testimony, exhibits, and record that had been developed during the jury trial. Upon the record in its entirety, the trial judge decided that Simpson was an "employee" for purposes of ADEA, ERISA, and Ohio Rev.Code § 4101.17. *Simpson v. Ernst & Young*, 850 F. Supp. 648 (S.D. Ohio 1994).

In reviewing this resolution of the ADEA and ERISA claims, this court initially notes that the distinction between a "partner" and an "employee" under both ADEA and ERISA is a preliminary jurisdictional issue. *See Waxman v. Luna*, 881 F.2d 237, 240 (6th Cir. 1989). In the absence of a conflict of material fact, it is appropriate for the court to resolve the issue as a matter of law. *Lilley v. BTM Corp.*, 958 F.2d 746, 750 at n. 1 (6th Cir.), *cert. denied*, 506 U.S. 940 (1992). In the instant case, the parties stipulated that no conflict of material fact existed as to this issue

and submitted it to the court on cross motions for summary judgment to be decided as a matter of law. This court reviews that court's determination *de novo*. *Waxman*, 881 F.2d at 240.

Following the resolution of the "partner versus employee" issue, the trial court convened a jury to consider the merits of plaintiff's ADEA claim. On May 12, 1994, the jury returned a verdict wherein it concluded that age had been a "determining factor" in Simpson's discharge and that Ernst & Young's ADEA violation was "willful." The jury awarded plaintiff past earnings, past benefits, future earnings, and future benefits. Although the trial court denied plaintiff prejudgment interest on his federal ADEA claim (because a prevailing plaintiff may not recover both liquidated damages and prejudgment interest under the ADEA), on October 28, 1994, it permitted him to recover prejudgment interest on past earnings and benefits pursuant to the Ohio age discrimination law. Ohio Rev. Code § 4101.17 (Anderson 1989). Earlier, on September 23, 1994, the trial court had addressed plaintiff's ERISA claim and resolved that Simpson's discharge was in retaliation for persistent requests for information concerning his retirement benefits under the merger. The court awarded Simpson ERISA damages which were set off against the ADEA claim. Defendant moved unsuccessfully for judgment notwithstanding the verdict of the jury and a new trial on January 18, 1995, but filed this timely appeal.

The trial court's summary judgment ruling is reviewed *de novo*. *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1388 (6th Cir. 1993). The jury verdicts returned in these proceedings are reviewed pursuant to the "sufficient evidence" rule. *See Agristor Leasing v. A.O. Smith Harvestore Prods., Inc.*, 869 F.2d 264, 269 (6th Cir. 1989). The legal issues inherent to the ERISA claim are reviewed *de novo*, and its factual issues are reviewed for clear error. *Schwartz v. Gregori*, 45 F.3d 1017, 1021 (6th Cir.), *cert. denied*, 116 S. Ct. 77 (1995). Resolutions concerning prejudgment interest and front pay are reviewed for abuse of discretion. *Shore v. Federal Express Corp.*, 42 F.3d 373, 380 (6th Cir. 1994).

A brief summary of the facts that gave rise to this controversy reflects that on October 1, 1989, the accounting firm of Arthur Young & Co. ("Arthur Young") merged with Ernst & Whinney to

form a mega-firm known as Ernst & Young. The proposed merger was presented to participating personnel of Certified Public Accountants (CPAs) and non-CPAs, i.e. lawyers, computer analysts, and individuals with advanced academic degrees in business administration in both firms via various pre-merger documents asserting that (1) there would be no major head count or staff reductions as a result of the merger, (2) the merger would result in equitable or better retirement benefits for all concerned, and (3) both predecessor firms anticipated that the merger would result in an increase in cash earnings and significant growth opportunities for all concerned. Upon these representations of the merger promoters, effected personnel were requested to execute commitments styled Agreement of the Parties—U.S. ("U.S.Agreement"), which defined the terms and conditions of their participation in the newly-created firm of Ernst & Young. The U.S. Agreement characterized CPAs as Capital Account Parties and non-CPAs as Investment Account Parties. The CPAs were each required to execute second documents styled Ernst & Young Partnership Agreement ("Partnership Agreement").

Contrary to the circulated pre-merger commitments, an Ernst & Young Management Committee, a council that had been formed in accordance with the complicated documentation of the combined U.S. Agreement and Partnership Agreement, secretly voted within days of the completed merger to eliminate "excess staff capacity" by 5%, and proceeded within the next two months to systematically discharge older partners. (Ex. 30; Tr. 5/24/94 at 1078; Tr. 12/8/93 at 249; Exs. 31-37). Simpson, who was a signatory to both the U.S. Agreement and the Partnership Agreement, was among those individuals requested to resign.

Plaintiff was born on September 27, 1943. Beginning in 1972, he worked for KMG/Main Hurdman ("KMG/MH"), an accounting firm where he had become the managing partner. In December 1986, Arthur Young acquired KMG/MH. He became the Cincinnati Managing Partner for Arthur Young. Following the 1989 merger with Ernst & Whinney, Gerald Hill ("Hill") replaced Simpson as the Cincinnati Managing Partner of Ernst & Young. Simpson was named to the lesser position of Cincinnati Director of Entrepreneurial Services.

It should be noted that, at the time of the merger, the combined firms had a projected unfunded retirement obligation which exceeded $290 million. By eliminating older partners before their interest in this pension vested, the newly-formed firm could avoid substantial unfunded accrued contingent retirement liabilities.

Preliminary to the announcement of its systematic discharge of older partners, the Management Committee had covertly directed the preparation of a comparative study captioned "Comparison of Partner Ages in Fiscal 1990," which included a subsection styled "Partner Resignations and Retirement." Another section considered by the Committee was "The Partner Recommendation Process," which addressed the admission of younger partners. The Committee's analysis ignored reducing partner compensation or freezing new partner admissions in favor of methodically eliminating older partners. Significantly, a member of the Management Committee testified that "it would be dumb" to lower compensation or freeze new partner admissions rather than discharge older partners. He testified further that it was necessary to discharge Simpson and other older partners to make room for the "bright young people." With this reflected mindset, the Management Committee terminated 120 partners over the age of 40 during an ensuing 18-month period while admitting 162 new partners under 40 years of age. Simpson was replaced by a partner under the age of 40.

To justify Simpson's discharge, Ernst & Young advanced a purported conflict of interest arising out of an undisclosed pre-merger personal home loan mortgage that he carried with a bank that subsequently became a firm client. Both the trial court and the jury rejected this argument as pretextual and specious, especially since an Ernst & Young internal investigation had absolved Simpson of any impropriety or wrongdoing. Moreover, the record disclosed that the only material information of interest to the Management Committee prior to terminating Simpson was his age and years of service with the firm, and his tenacity in pursuing his post merger retirement benefits.

In considering the issue of Simpson's status of "partner" or "employee" within the context of the ADEA and ERISA, the trial court found that the promoters of the merger prevailed upon Simpson and other personnel similarly situated to execute

documents designed to centralize all power to manage the newly-created firm and its assets through an intentionally ambiguous business structure calculated to divest Simpson and others similarly situated of all indicia of meaningful partnership participation in the new firm. The characterization of "partner" was a title that carried no legal significance which could be disclaimed when convenient to the defendant's management. Simpson and his similarly situated colleagues were relegated to the position of an employee subject to the virtually absolute, unilateral control of the Management Committee.

To support its conclusion that Simpson was an employee rather than a partner in the newly-created firm of Ernst & Young for purposes of both the ADEA and ERISA, the trial judge found that Simpson had no authority to direct or participate in the admission or discharge of partners or other firm personnel; participate in determining partners or other personnel compensation predicated upon performance levels, responsibility, and years of service with the firm, including his own; participate in the vote for the chairman or the members of the Management Committee; or participate in the firm's profits and losses or share in unbilled uncollected client accounts ("UBT's"). Simpson had no right to examine the books and records of the firm except to the extent permitted by the Management Committee. He was required to execute a will which mandated that his heirs accept as binding the accounts provided by Ernst & Young with no right of inspection or verification. He had no authority to sign promissory notes on behalf of the firm, or pledge, transfer, or otherwise assign his interest in the firm. He was refused access to data concerning various client accounts. He was denied participation in annual performance reviews and other indicia of partnership status.

In sum, the firm's business, assets, and affairs were directed exclusively by a 10 to 14 member Management Committee and its chairman. The Management Committee exercised exclusive control over the admission and discharge of all personnel, including Simpson. It could terminate employees without cause and without a right to appeal such decisions. The Management Committee unilaterally determined the compensation of all personnel, which authority was exercised and executed in total secrecy. Simpson and those similarly situated had no vote for the chairman or the

members of the Management Committee. Instead, the Management Committee appointed its chairman and its chairman appointed the members of the Management Committee. In assessing Simpson's status as a "partner" or "employee," the trial court concluded that:

> Simpson had few, if any, meaningful attributes of a partner. For all practical purposes, he was an employee with the additional detriment of having promised to be liable for the firm's losses. Ernst & Young was free to draft its Partnership Agreement and U.S. Agreement in such a way as to generate the belief in its employees that they enjoyed partnership status and to permit them to represent themselves as partners. However, because these individuals actually had no bona fide ownership interest, no fiduciary relationship, no share in the profits and losses, no significant management control, no meaningful voting rights, no meaningful vote in firm decisions, and no job security, they were not bona fide partners. Therefore Ernst & Young was obligated not to discriminate against them because of their age, sex, race, religion, national origin, or handicap.

In the instant appeal, the defendant has implied that the trial court erroneously applied the "economic realities" test adopted by this circuit in *Lilley v. BTM Corp.*, 958 F.2d 746 (6th Cir.) *cert. denied*, 506 U.S. 940 (1992), in arriving at its decision because *Lilley* was overruled or at least called into question by the Supreme Court's decision in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992), which mandated "a common-law test for determining who qualifies as an 'employee' under ERISA," and applied agency law principles, *id.* at 323. In its opinion, the trial court expressed some doubt about the continuing vitality of *Lilley* after *Darden*. It is against this backdrop that the court examines the ultimate decision of the trial court.

Initially, it is noted that *Lilley*, like *Darden*, defines the underlying common denominator of the employer/employee rubric as the employer's ability to control job performance and employment opportunities of the aggrieved individual as the most important of many elements to be evaluated in resolving the issue after assessing and weighing all of the incidents of the relationship with no one factor being decisive, as directed in *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968). *See also Goldberg*

v. Whitaker House Cooperative, Inc., 366 U.S. 28, 33 (1961); *NLRB v. Hearst*, 322 U.S. 111, 128-29 (1944).

A panel of this circuit recently concluded that *Lilley's* economic realities test juxtaposed with *Darden's* common-law agency test disclosed no material difference. In *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213 (6th Cir. 1992), the court summarized the controlling law in *Darden*, *Lilley*, and their progenitors by observing:

> In *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983), we .... decided that independent contractors would be covered by Title VII if, under an "economic realities" test, they are susceptible to the types of discrimination Title VII meant to prohibit. Although we did not explain in *Armbruster* what sorts of economic realities would tip the scales toward coverage, other circuits using similar tests have held that the *employer's ability to control the job performance and employment opportunities of the plaintiff is the most important factor*. *See, e.g., Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1160-61 (5th Cir. 1986) (affirming dismissal against independent contractor truck driver); *Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 425 (7th Cir. 1986) (reversing dismissal against independent contractor physician denied staff privileges at hospital).

Id. at 218-19 (emphasis added).

The *Eyerman* panel of this court essentially concluded that no substantive conflict between the "economic realities test" as applied in *Lilley*, *see* 958 F.2d at 750 (leaving the determination of employment status to "case-by-case resolution based on the totality of the circumstances"), and *Darden's* mandate, *see* 503 U.S. at 323 ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989)). *See Eyerman*, 967 F.2d at 219 n. 5.

Applying the *Darden* analysis of the master/servant relationship to the instant case, as particularized by the traditional common-law agency doctrine, this appellate consideration reviews

numerous factors impacting the employment relationship to be judged in arriving at a decision with no one decisive factor. Among the elements to be debated in determining the independent contractor/employee question are: the hiring party's right to control the manner and means by which the product is accomplished; the skill required by the hired party; the duration of the relationship between the parties; the hiring party's right to assign additional projects; the hired party's discretion over when and how to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the hiring party's regular business; the hired party's employee benefits; and tax treatment of the hired party's compensation. *Darden*, 503 U.S. at 323-24.

Applying an analog of the Supreme Court's pronouncements in *Darden* to the record in this case, as suggested by Ernst & Young, it is apparent that Simpson does not qualify as a partner for purposes of the ADEA, ERISA, and Ohio Rev. Code § 4101.17, under either the traditional principles of the common-law agency doctrine or the "economic realities" test.

Although the conventional agency test is directed to the independent contractor/employee issue, neither this circuit nor the Supreme Court have, to date, considered the partner versus employee question. In approaching the subject, it is significant to observe that bona fide independent contractors and partners are employers, not employees; and as employers, neither come within the entitlement protection or coverage of either the ADEA or ERISA.

The circuits that have already judged the partner/employee dichotomy have done so by "leaving the determination of employment status to case-by-case resolution based on the totality of the circumstances," *Lilley*, 958 F.2d at 750; *see Darden*, 503 U.S. at 323-24, against the backdrop of the Uniform Partnership Act ("UPA"), that has been adopted by most states, including New York, which provides the applicable law to the agreements here under review. *See generally* N.Y. Partnership Law § 1 *et seq.* (McKinney 1988).

In *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987), the Tenth Circuit analyzed the "total

bundle of partnership characteristics" to distinguish partners from employees. *Id.* at 276. In *Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398 (11th Cir. 1991), the Eleventh Circuit similarly stated:

> [W]e look to the particular circumstances of the case at hand and, in so doing, we focus not on any label, but on the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control and ownership.

Id. at 1400-01 (citation omitted).

This court, in addressing the distinction between partners and employees, an issue of first impression within this circuit, evaluates the undisputed facts[1] of the instant case against the common-law principles as codified in the UPA, including, but not limited to: the right and duty to participate in management; the right and duty to act as an agent of other partners; exposure to liability;[2] the fiduciary relationship among partners; use of the term "co-owners" to indicate each partner's "power of ultimate control;" participation in profits and losses; investment in the firm; partial ownership of firm assets; voting rights; the aggrieved individual's ability to control and operate the business; the extent to which the aggrieved individual's compensation was calculated as a percentage of the firm's profits; the extent of that individual's employment security; and other similar indicia of ownership. *See Fountain*, 925 F.2d at

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[1] In the absence of a conflict of material fact (as stipulated by the parties), which would be resolved by a jury, it is appropriate for the court to resolve the partner/employee relationship *de novo*. *Cf. Lochman v. Charlevoix*, No. 95-1930, 1996 WL 494579, at *6 (6th Cir. Sep. 3, 1996).

[2] Although the U.S. and Partnership Agreements provide that Simpson was jointly and individually liable for the losses of Ernst & Young, under the facts and circumstances of the instant case, where he had no authority to control the risks undertaken by his "partners," no right to examine the firm's books, and no ability to exercise other ownership attributes, it is questionable if his liability could have been enforced, especially in light of the lack of consideration for his commitment.

1400-01; *Wheeler*, 825 F.2d at 276; *Caruso v. Peat, Marwick, Mitchell & Co.*, 664 F. Supp. 144 (S.D.N.Y. 1987).[3]

Within the embrace of the foregoing criteria, this court concludes that the plaintiff does not qualify as a partner for purposes of the ADEA, ERISA, or Ohio Rev. Code § 4101.17 (Anderson 1989). Accordingly, for the reasons stated herein the decision of the trial court to recognize Simpson as an employee in contradistinction to a partner is AFFIRMED.

To support a prima facie case of an ADEA violation, Simpson was required to prove he "lost out *because of his age.*" *O'Connor v. Consolidated Coin Caterers*, 116 S. Ct. 1307, 1310 (1996); *see Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1329 (6th Cir. 1994). Without repeating many of the facts already related herein and more comprehensively discussed by the trial court in arriving at its disposition, this court notes that (1) the new firm's unfunded retirement obligation projected to exceed $290 million, (2) the convoluted Partnership and U.S. Agreements which were calculated to create only an illusion that the firm's personnel were partners, and (3) the arrogant and arbitrary treatment accorded Simpson and those similarly situated reflect a design by that the promoters of the merger and, subsequently, the Management Committee to deny Simpson and those similarly situated with him from bona fide partners status.

The jury, after considering the evidence in its entirety, and after assigning greater credibility to the plaintiff's found that the promoters of the Ernst & Young merger had wilfully devised a management structure that was, from its very inception, designed to preclude Simpson and his similarly situated associates from any bona fide ownership interest, fiduciary position, management control, voting rights and privileges, share in the profits, and meaningful vote in firm decisions, including decisions involving job

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[3] Ernst & Young, in support of its position that Simpson was a partner, cites to *Hyland v. New Haven Radiology Associates*, 794 F.2d 793 (2d Cir. 1986); *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984); *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977). None of these cases question the plaintiff's ownership participation in the employing entity.

security. Moreover, by threatening vigorous enforcement of a "noncompete clause" against Simpson to embrace "all clients or potential clients" of Ernst & Young, which had become one of the world's largest professional service firms, defendant effectively foreclosed Simpson from pursuing his profession as a CPA for two years.

From the evidence developed during the course of the trial, which was common to both the ADEA and ERISA claims, a jury could reasonably conclude that age had been a "determining factor" in Simpson's discharge and his termination was wilful, which findings justifiably anchored the jury's award for past earnings, past benefits, future earnings, and future benefits. Accordingly, this court concludes that the jury's verdict was supported by sufficient evidence, was not clearly erroneous, and is AFFIRMED.

A decision to submit the issue of front pay to the jury is committed to the sound discretion of the trial court and is reviewed on appeal for abuse of discretion. *Schwartz v. Gregori*, 45 F.3d 1017, 1023 (6th Cir.), *cert. denied*, 116 S. Ct. 77 (1995); *Shore v. Federal Express Corp.*, 42 F.3d 373, 377-78 (6th Cir. 1994); *Roush v. KFC National Management Co.*, 10 F.3d 392, 398-99 (6th Cir.), *cert. denied*, 115 S. Ct. 56 (1994).

In reviewing the amount of front pay awarded by a jury, the evidence is construed in favor of the prevailing party. In the instant case, plaintiff presented a well-documented economic analysis reflecting the present value of his future damages. Ernst & Young presented no adequate credible explanation to contradict plaintiff's calculations. *See Shore v. Federal Express Corp.*, 777 F.2d 1155, 1159-60 (6th Cir. 1985). The calculations were supplemented by evidence that disclosed the underlying hostility that existed between defendant and Simpson, making reinstatement highly impractical and improbable. This is reflected, for example, by (1) his discharge without notice and without the opportunity of a performance review, (2) the curt, non-informative and arbitrary written responses to his retirement inquiries, (3) the divestiture of the units that he owned in Arthur Young's UBT receivables (unbilled time), and (4) the threat of strict enforcement of the non-compete conditions. In light of the foregoing, the trial court's decision to submit the award of front pay to the jury was not an

abuse of discretion and the amount of the jury's award is supported by sufficient evidence, not clearly erroneous, and is AFFIRMED.

Having observed that the trial court's factual findings inherent to plaintiff's ERISA claims are, on appeal, reviewed for clear error and its legal conclusions are judged de novo to determine if the district court abused its discretion in applying the law to the facts as already discussed herein, this court considers the plaintiff's ERISA claims within the dictates of *Lilley v. BTM Corp.*, 958 F.2d 746 (6th Cir.), *cert. denied*, 506 U.S. 940 (1992). It concludes that the trial court did not abuse its discretion in applying the law to its findings of fact, which survived the clearly erroneous standard of appellate inquiry. The trial court's award of ERISA damages is AFFIRMED.

In Ohio, an award of prejudgment interest is appropriate under circumstances where a party fails to negotiate a good faith settlement. Ohio Rev. Code § 1343.03(C); *Kalain v. Smith*, 495 N.E.2d 572 (1986).

The trial court invoked Ohio Rev.Code § 1343.03(c) upon a record that disclosed a total disinterest on behalf of Ernst & Young to discuss settlement even after the district court dismissed its initial motion for summary judgment seeking a declaration that Simpson was a partner and not an employee. Defendant remained averse to settlement discussion after it became apparent that legal precedent existed supporting plaintiff's position that he was an employee, after a jury mistrial reflected that Simpson's claim had merit, after the court granted plaintiff's motion for summary judgment declaring him to be an "employee" as distinguished from a "partner" in the Ernst & Young firm, and during all phases of the proceedings. Defendant virtually slammed the door of negotiation on innumerable plaintiff overtures to settle the controversy in lieu of continuing protracted, costly legal proceedings.

Upon the record, this court concludes that the trial court did not abuse its discretion in awarding prejudgment interest.

Accordingly, the judgment of the district court is AFFIRMED in its entirety.

MARTHA CRAIG DAUGHTREY, Circuit Judge, concurring.

I concur in the results reached by my colleagues in this matter. I write separately, however, to encourage the legislative branch of our federal government to recognize as well that the realities of today's global marketplace no longer justify distinguishing between "employees" and "partners" in all instances.

In an era of small, closely-operated partnerships, it may have been logical to conclude that an employer/partner could not and would not discriminate in employment decisions against himself or herself or against a close friend and business associate. In a world-wide organization like Ernst & Young that employs almost 2200 "partners," however, the nominal co-owners of the company are, by necessity, so far removed from the seat of actual power as to be subject to the reach of the invidious acts that employment discrimination statutes seek to remedy. Only by statutory modifications redefining the class of individuals to be protected from such mistreatment can we ensure that hiring, promotion, and firing decisions are undertaken with proper regard for the law of the land.

APPENDIX B

C-1-91-196

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

P. LARUE SIMPSON, Plaintiff

v.

ERNST & YOUNG, et al., Defendants.

Filed March 26, 1993

ORDER

Plaintiff LaRue Simpson, a citizen of the Commonwealth of Kentucky, brings this action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626; the Employee Retirement Income Security Act (ERISA), 28 U.S.C. § 1140; Ohio's Age Discrimination in Employment statute, Ohio Rev. Code § 4101.17; and, a claim of unjust enrichment under Ohio common law. Defendant Ernst & Young is an accounting firm licensed in the State of New York with its principal place of business in New York, New York. Defendant does business in the Southern District of Ohio, Western Division.

This matter is before the Court upon plaintiff's motion for partial summary judgment (doc. no. 43), defendant's motion for summary judgment (doc. no. 44), the parties' responses to these actions (doc. nos. 48, 53-56, 81, 84, 90, 95), the parties' proposed findings of fact and conclusions of law (doc. nos. 80, 82, 87, 88), plaintiff's motion to strike (doc. no. 96), defendant's memorandum in opposition (doc. no. 97), plaintiff's motion to file newly discovered evidence (doc. no. 99), and defendant's motion to strike (doc. no. 100). The parties have filed numerous affidavits and

depositions. On December 9, 1992, this court heard oral arguments on the parties' motions for summary judgment.

I.

Plaintiff was born on September 27, 1943. He was practicing certified public accountant from 1968 to 1990. In 1986 he joined the accounting firm of Arthur Young where, in 1987, he became the Office Managing Partner of the Cincinnati, Ohio office.

In 1989, Arthur Young merged with Ernst & Whinney, another accounting firm, becoming the general accounting partnership Ernst & Young, the defendant in this case. Plaintiff voted in favor of the merger. Following the merger plaintiff became Director of Entrepreneurial Services for Ernst & Young's Cincinnati office. He also held administrative responsibility for certain aspects of marketing. His immediate supervisor was Gerald Hill, the Managing Partner of Ernst & Young's Cincinnati office.

In September 1989 plaintiff wrote the first of several memoranda to members of Ernst & Young's Management Committee concerning the impact of the merger upon his retirement benefits. Plaintiff alleges that his written inquiries and the responses he received included an analysis of Ernst & Young's Defined Benefits Retirement Plan.

Plaintiff was not satisfied with the responses he received to his inquiries. On February 7, 1990, one of Ernst & Young's Regional Managers suggested to plaintiff that he "call it a day" on this subject (doc. no. 43, plaintiff's ex. 15).

Although the parties largely dispute the circumstances surrounding the end of their relationship, a few things are clear: Ernst & Young asked plaintiff to resign from the firm in May 1990, plaintiff refused, and on June 19, 1990, plaintiff was notified in writing that he was terminated as a partner at Ernst & Young effective December 19, 1990. Plaintiff was 46 years old. A partner named Donald Fritz assumed plaintiff's position as Director of Entrepreneurial Services in the Cincinnati office. Fritz was under age 40 at the time.

Plaintiff alleges that he had no input concerning his dismissal and that Ernst & Young's Management Committee unilaterally selected plaintiff for termination (doc. no. 43, ex. 2).

Ernst & Young maintains that plaintiff was selected to withdraw from the partnership for legitimate business reasons including unacceptable productivity, lack of technical competence, lack of professional and business judgment, and plaintiff's difficulty in adjusting to the merger, especially the fact that he was not selected as the Office Managing Partner in Cincinnati.

Plaintiff claims that his termination violated the ADEA, Ohio Rev. Code § 4101.17, ERISA, and constituted unjust enrichment. He seeks $3,000,000.00 in compensatory damages, and $3,000,000.00 in punitive damages.

II.

The legal standard for consideration and disposition of issues on summary judgment is well settled and is set forth in *Goldstein v. D.D.B Needham*, 740 F. Supp. 461, 463 (S.D. Ohio 1990).

Ernst & Young contends that it is entitled summary judgment in its favor on plaintiff's ADEA claim because plaintiff's status as a partner rather than an employee places him beyond the reach of the ADEA.

The ADEA prohibits an employer from discharging an employee, who is at least 40 years of age, on the basis of his or her age. 29 U.S.C. §§ 623(a), 631(a); *Lilley v. BTM Corp.*, 958 F.2d 746, 752 and n.3 (6th Cir.), *cert. denied*, ___ U.S. ____, 61 U.S.L.W. 3301 (1992). The ADEA defines "employee" by the following circular generality: "the term "employee" means "an individual employed by an employer..." 29 U.S.C. § 630(f). This definition "leave[s] great room for interpretation..." *E.E.O.C. v. First Catholic Slovak Ladies Ass'n.*, 694 F.2d 1068, 1069 (6th Circ. 1982), *cert. denied*, 464 U.S. 819 (1983). The term "employee" as used in the ADEA must be broadly construed "to effectuate the remedial purposes of the ADEA." *Lilley*, 958 F.2d at 750.

Neither the United States Supreme Court nor the Sixth Circuit Court of Appeals has considered the statutory interpretation question of whether a partner is an employee within the meaning of the ADEA. This Court therefore turns to the thorough, well-reasoned opinion in *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987), and finds that when an employer is a general partnership, a plaintiff actually holding the

status of a general partner is not an "employee" within the meaning of the ADEA. *Id.* at 276; *see also Caruso v. Peat, Marwick, Mitchell & Co.*, 717 F.Supp. 218, 221-22 (S.D.N.Y. 1989).

Answering this statutory interpretation question, however, does not automatically entitle Ernst & Young to summary judgment since labelling plaintiff a 'partner' does little to illuminate the actual nature of his employment relationship with Ernst & Young. The Court must therefore determine whether the undisputed material facts construed in plaintiff's favor establish that he was actually an employee or a partner. *See Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398, 1400-01 (11th Cir. 1991); *see also Lilley*, 958 F.2d at 750; *Wheeler*, 825 F.2d at 276; *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793, 800-02 (2d Cir. 1986) (Cardamone, J. dissenting); *Caruso*, 717 F.Supp. at 221-23.

The determination of whether an individual is an employee within the meaning of the ADEA is a mixed question of law and fact which normally can be resolved by the Court. *Lilley*, 958 F.2d at 750 n.1. When genuine issues of material fact exist, however, the question must be resolved by the finder of fact. *See id.*

Ernst & Young contends that plaintiff's status as a partner is seen in the following: he was entitled to vote on the merger between Arthur Young and Ernst & Whinney; he voted in favor of creating Ernst & Young; he signed the partnership agreement; he had the right to participate in the management and operation of Ernst & Young subject to the partnership agreement; he was required to make capital contributions to the partnership; he received distributions of the partnership's profits; he was jointly liable with his other partners for the obligations of the partnership; he reported his income to the Internal Revenue Service by filing a Schedule K-1, a form titled "Partner's Share of Income Credits"; he characterized himself in his resume, prepared after his termination from Ernst & Young, that he was "Partner-in-Charge" of defendant's Entrepreneurial Department; and, in his complaint he judicially admitted his partnership status by repeatedly referring to himself as a former partner with Ernst & Young.

In ADEA cases the United State Court of Appeals for the Sixth Circuit examines that totality of the circumstances to ascertain the economic realities of the parties' employment relationship. *Lilley*,

958 F.2d at 750. In the instant case, the economic reality of plaintiff's employment relationship with Ernst & Young must be ascertained by examining the totality of circumstances under the standards courts have traditionally used to distinguish employees and partners such as those set forth in the UPA and the dual factors of compensation and control. *See Lilley*, 958 F.2d at 750-51; *Fountain*, 925 F.2d at 1401; *Wheeler*, 825 F.2d at 276; *Hyland*, 794 F.2d at 801-802 (Cardamone, J. dissenting).

The UPA sets forth the following characteristics of a partner:

> (1) unlimited liability;
>
> (2) the right to share in profits and participate in management subject to agreement between partners;
>
> (3) the right and duty to act as an agent of the other partners; and
>
> (4) shared ownership.

Wheeler, 825 F.2d at 267 (citations omitted).

Reading the partnership agreement and construing the genuinely disputed material facts in plaintiff's favor, this Court concludes that a genuine dispute exists over whether plaintiff was an employee or a partner. The partnership agreement structured Ernst & Young into several strata of personnel including the Chairman; the ten to fourteen-member Management Committee, of which plaintiff was not a member; an Advisory Council, of which plaintiff was not a member; and, two groups of parties, one of which included plaintiff. *See* doc. no. 43, Ex. 3. The Management Committee controlled Ernst & Young's "business, assets, and affairs..." *Id.* at § 4(a). These broad terms indicate that plaintiff held little, if any, actual power to affect the management of Ernst & Young. *See* doc. no. 43, ex. 3, §§ 3, 4. A genuine issue therefore exists over whether plaintiff was in an employment situation where he had no voice in the management of Ernst & Young, while more powerful individuals — the Chairman and other members of the Management Committee — held sway over Ernst & Young's destiny.

Certain sections of the partnership agreement tend to show that plaintiff's position was that of an employee. Section 20(a), for example, prevented plaintiff from legally binding Ernst & Young

to "any promissory note, draft, bond, or other obligation for the payment of money, or pledge credit or assets of the Firm as surety or guarantee..." *See Stone v. First Wyoming Bank, N.A., Lusk*, 625 F.2d 332, 343 (10th Cir. 1980); *see also* U.P.A. §9; 6 Unif. Laws Ann. 132 (West 1989). Section 20(e) prevented plaintiff from viewing Ernst & Young's books, accounts, or records absent permission of the Management Committee or the Chairman. *See U.S. v. Mandel*, 437 F.Supp. 258 (D.Md. 1977); *see also* U.P.A. § 19; 6 Unif. Laws Ann. 254.

Section 8(b) provided plaintiff with compensation in the form of an annual salary as determined by the Management Committee (doc. no. 43, Ex. 3). Although section 8(b) also provided that the Management Committee would each year determine the amount of Ernst & Young's earning payable to plaintiff, the partnership agreement mandated the Management Committee to consider the amount of plaintiff's annual salary when calculating his yearly share of firm profits. The partnership agreement also failed to set forth a specific formula for calculating the amount of firm earnings due plaintiff, thereby leaving plaintiff in the position of an employee whose amount of yearly earnings was subject to the discretion of a higher authority. This hierarchical compensation system tends to show classic employer/employee bonding. *See Caruso*, 717 F.Supp. at 222.

Plaintiff also had no voting rights concerning who would be on the Management Committee. *See* doc. no. 43, Ex. 3, § 3(a).

Plaintiff was one of over 2,000 "partners" in the United States and one of over 6,000 "partners" worldwide. In light this large number of "partners", plaintiff's status within Ernst & Young was relatively insignificant, especially when the partnership agreement vested so much power in the Chairman and the Management Committee and left plaintiff with so little power over management, control, or compensation. A reasonable juror could conclude, as plaintiff asserts: "Common sense dictates that no firm operates with 2,000 bosses..." (doc. no. 43, motion for partial summary judgment attached, p. 8).

Ernst & Young argues that the instant case is factually parallel to *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir. 1987), where the Court of Appeals determined that a general partner in a large

accounting firm was not an employee within the meaning of the ADEA. This Court disagrees. In *Wheeler*, the Court of Appeals determined that the plaintiff was actually a partner because she participated in the defendant's profits and losses, she was exposed to liability, she invested in the firm, she was a partial owner of firm assets, she held voting rights, and only a small percentage of the firm's personnel were admitted to the partnership. 825 F.2d at 276. In the instant case, the Ernst & Young partnership agreement did not provide plaintiff with a similar degree of power or control. *Supra*, pp. 7-9.

Ernst & Young contends that plaintiff's use of the term "partner" in the complaint constitutes a judicial admission of his employment status. Plaintiff's use of the term "partner" in the complaint constitutes a judicial admission only to the extent that the term is used as a label. Since plaintiff has strenuously argued that he was an employee within the meaning of the ADEA throughout the course of this litigation, his use of the term "partner" in his complaint does not constitute an admission that is dispositive of this mixed legal and factual issue. Similarly, the parties' use of the term "partner" to describe plaintiff both before and after his tenure at Ernst & Young is only the beginning point of the analysis of the economic realities presented by plaintiff's employment situation. *See Fountain*, 925 F.2d at 1400-1401. The proper focal point is plaintiff's actual role in the management, control, and ownership of Ernst & Young. *See id.*; *see also Lilley*, 958 F.2d at 750-51; *Wheeler*, 825 F.2d at 276; *Caruso*, 717 F.Supp. at 221-23.

Ernst & Young's remaining contentions lack merit because they focus on plaintiff's situation before the merger. It is of no significance for purposes of analyzing plaintiff's actual employment relationship with Ernst & Young that plaintiff voted in favor of the merger or signed the partnership agreement. It is the actual nature of plaintiff's employment relationship with Ernst & Young that must be ascertained. *Supra*, p. 5.

Lastly, the parties agree that Ohio Rev. Code § 4101.17 is interpreted in accordance with the ADEA. *See Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 437 (6th Cir. 1988). To the extent therefore that Ernst & Young argues that plaintiff is not an employee within the meaning of Ohio Rev. Code § 4101.17, the

preceding analysis renders the contention meritless at this point in the litigation.

Accordingly, the record contains genuine issues of material fact concerning the issue of whether plaintiff's actual relationship with Ernst & Young was that of an employee or partner within the meaning of both the ADEA and Ohio Rev. Code § 4101.17, and consequently, Ernst & Young is not entitled to summary judgment in its favor.

III.

Plaintiff contends that he is entitled to partial summary judgment in his favor on his claim under the ADEA and Ohio Rev. Code § 4101.17, because he has demonstrated a prima facie case of age discrimination, and because he has shown that Ernst & Young's asserted reasons for discharging plaintiff were pretextual.

Ernst & Young argues that plaintiff has not produced evidence supporting the existence of a prima facie case of age discrimination. Ernst & Young further contends that legitimate non-discriminatory reasons existed for selecting plaintiff for withdrawal, and that plaintiff has not produced evidence showing these reasons to be a pretext for age discrimination.

To establish a prima facie case of age discrimination, plaintiff must demonstrate the following:

(1) he was a member of the protected class (over age 40);

(2) he was subjected to adverse employment action;

(3) he was qualified for the position; and

(4) he was replaced by a younger person.

Lilley, 958 F.2d at 752 (quoting *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 940 (6th Cir. 1987)) (other citation omitted).

Construing the evidence in plaintiff's favor, the Court finds that he has met his burden of establishing prima facie case of age discrimination. Plaintiff was 46 years old on the date he was notified of his termination. Since plaintiff did not voluntarily withdraw from Ernst & Young and since the Management Committee terminated the parties' employment relationship (doc. no. 43, Ex. 5), a reasonable juror could conclude that Ernst &

Young subjected plaintiff to an adverse employment action. A reasonable juror could also conclude that plaintiff was qualified for the position of Director of Entrepreneurial Services in Ernst & Young's Cincinnati office based on the evidence indicating that plaintiff had been a practicing certified public accountant since 1967, and that he had held the position of Managing Partner in Arthur Young's Cincinnati office between 1987 and 1989.

Plaintiff has produced affirmative evidence indicating that he was replaced by Donald Fritz, a younger person with working in Ernst & Young's Cincinnati office. Ernst & Young contends that plaintiff cannot show he was replaced by a younger worker because "spreading the former duties of a terminated employee among the remaining employees does not constitute replacement." *Lilley*, 958 F.2d at 752. This contention lacks merit because unlike the situation in *Lilley*, plaintiff was not one of a group of sales personnel with interchangeable responsibilities. Plaintiff was the head of a department still in existence at Ernst & Young and whose management a younger person assumed upon plaintiff's termination. *See* Fritz dep., p. 50-51.

Plaintiff is not entitled to summary judgment in his favor on his age discrimination claims, because the records contains affirmative evidence supporting Ernst & Young's assertion that its decision to require plaintiff to withdraw was based on legitimate non-discriminatory business reasons.[1] *See Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). These reasons include "plaintiff's poor attitude, lack of competence, lack of business development skills, unacceptable integrity/judgment/professional ethics, lack of commitment to the firm, clouded operating perspective and best interests of the firm." (doc. no. 53, p. 18). Whether these reasons constituted a pretext for age discrimination remains a genuinely disputed matter since plaintiff has produced evidence indicating that the reasons were pretextual. For example, Ernst & Young's investigation into certain alleged conflict of interest held by plaintiff resulted in a finding of no conflict, *id.* Hill's aff. at ¶ 5; and, Ernst & Young's alleged concern with plaintiff's low billing hours is opposed by

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[1] *E.g.*, Hill's aff., doc. no. 43, Ex. 8.

plaintiff's assertion that he was on schedule to meet the target number of billing hours required of him, *id.*, plaintiff's aff. at § 19. Plaintiff, moreover, has shown pretext in Ernst & Young's reliance on a certain delinquent loan plaintiff held as a reason for discharge, because Ernst & Young's auditor states that they were not concerned with whether plaintiff held any delinquent loans, but instead they were concerned with whether any conflict existed (Wasco's dep., pp. 35-39).

Accordingly, the records contain genuine disputes over many of the material facts underlying plaintiff's age discrimination claims, and as a result, neither party is entitled to summary judgment on plaintiff claims under the ADEA or Ohio Rev. Code § 4101.17.

IV.

Plaintiff contends that Ernst & Young violated his rights under ERISA by discharging him approximately one year before his retirement benefits would have vested. Plaintiff alleges that in January 1990 the Management Committee instituted a nationwide plan to terminate partners, including plaintiff, to prevent their retirement benefits from vesting. This is shown, in part, because when Ernst & Young was created, its unfunded retirement obligation exceeded $290,000,000.00.

Ernst & Young contends that since plaintiff was a partner and since the partnership agreement, which created the defined benefits plan, was signed only by partners, the plan was not covered by ERISA, and plaintiff cannot be a beneficiary within the meaning of ERISA.

ERISA provides in pertinent part:

> It shall be unlawful for any person to discharge. . . a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefits plan. . . or for the purpose of interfering with the attainment of any right to which such a participant may become entitled to under the plan.

29 U.S.C. § 1140.

Ernst & Young is not entitled to summary judgment in its favor on plaintiff's ERISA claim because a genuine issue exists

over whether plaintiff's termination was due to his numerous inquiries about his retirement benefits. Plaintiff was notified of his termination in early 1990 several months after he had made repeated inquiries about the effect of the merger on his retirement benefits. His termination took effect approximate one year prior to the date his retirement benefits would have vested. Construing this in plaintiff's favor, a reasonable finder of fact could conclude from that Ernst & Young terminated plaintiff to avoid meeting its obligations to plaintiff under the ERISA plan.

Ernst & Young's contentions regarding the fact that plaintiff was a partner and therefore not protected by ERISA lack merit at the summary judgment stage because a genuine dispute exists on the issue of whether plaintiff was an employee or a partner. *Supra*, pp. 11.

Accordingly, Ernst & Young is not entitled to summary judgment in its favor on plaintiff's ERISA claim.

V.

Ernst & Young contends that it is entitled to summary judgment on plaintiff's unjust enrichment claim since, absent either fraud or undue influence, unjust enrichment cannot exist when the partnership agreement set forth the compensation due plaintiff upon his withdrawal from Ernst & Young.

Plaintiff contends that Ernst & Young received a substantial client base at considerable cost to plaintiff when it terminated him and when it enforced a non-compete agreement against him.

Unjust enrichment exists in Ohio "when a person has or retains money or benefits which in justice and equity belong to another." *Alleman v. Mears*, App. No. 1371, 1989 Ohio App. LEXIS 3212 (11th App. D., Aug. 18, 1989) (citing *Hummel v. Hummel*, 133 Ohio St. 520, 528 (1938)); *see also City of Cincinnati v. Cincinnati Reds*, 19 Ohio App. 3d 227, 230 (1987). A plaintiff may not recover when a defendant retains a benefit under the parties' contract unless the plaintiff shows the existence of fraud, illegality, or bad faith. *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 222 (6th Cir. 1992).

Ernst & Young is entitled to summary judgment in its favor on plaintiff's unjust enrichment theory. By entering the partnership

agreement with Ernst & Young, plaintiff agreed to the compensation set forth in Section 11 in the event of his involuntary termination. *See* doc. no. 43, Ex. 3, § 11. Plaintiff also agreed to a non-compete clause in the event of involuntary termination. *See id.* at § 20(d). Plaintiff has produced no affirmative evidence showing that Ernst & Young engaged in fraud, illegality, or bad faith in the forming of the partnership agreement. He may not, therefore, obtain, under a theory of unjust enrichment, that which he contracted away to Ernst & Young. *See Eyerman*, 967 F.2d at 222; *Ullmann v. May*, 147 Ohio St. 468 (1947).

In the event plaintiff establishes his claims under ERISA, to the extent plaintiff seeks to recover the benefits arguably due him under Ernst & Young's Defined Benefits Plan on a breach of contract theory, his state-law claims would be preempted by ERISA. *See Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1274-75 (6th Cir. 1991), *cert. dismissed*, ___ U.S. ___, 113 S.Ct. 2 (1992).

This Court finds that it lacks diversity jurisdiction over plaintiff's state claims as it is undisputed that some Ernst & Young partners are citizens of the Commonwealth of Kentucky. Through those partners, Ernst & Young resides in Kentucky for purposes of diversity jurisdiction analysis. *See Carden v. Arkoma Associates*, 494 U.S. 185, 195 (1990). Since plaintiff is also a Kentucky citizen, diversity jurisdiction is lacking. *See id.* This Court will not exercise supplemental jurisdiction over plaintiff's contract claims, because these state-law claims — unlike plaintiff's age discrimination claims under Ohio Rev. Code § 4101.17 — are not connected to plaintiff's federal age discrimination claims. *See* 28 U.S.C. § 1367(c). Under these circumstances judicial economy would warrant dismissal of plaintiff's state contract claims. As this Court cannot determine whether these claims should be dismissed with prejudice as preempted by ERISA or without prejudice because this Court lacks jurisdiction of the subject matter, the Court determines that summary judgment is not appropriate as to these state claims.

ORDER

The Court hereby **ORDERS** that:

(1) Plaintiff's motion for partial summary judgment (doc. no. 43) is **DENIED**;

(2) Defendant's motion for summary judgment (doc. no. 44) is **GRANTED** as to plaintiff's claim of unjust enrichment and this claim is **DISMISSED** with prejudice.

(3) Defendant's motion for summary judgment (doc. no. 44) is **DENIED** as to plaintiff's federal claims under ERISA.

(4) Defendant's motion for summary judgment (doc. no. 44) is **DENIED** as to plaintiff's claims under the ADEA and Ohio Rev. Code § 4101.17;

(5) Plaintiff's motion to strike (doc. no. 96) is **DENIED** as plaintiff has not shown any prejudice by defendant's late submission of supplemental materials; and,

(6) Plaintiff's motion to submit newly discovered evidence (doc. no. 99) is **GRANTED**;

(7) Defendant's motion to strike (doc. no. 100) is **DENIED**.

IT IS SO ORDERED.

/s/
Herman J. Weber, Judge
United States District Court

APPENDIX C

Case No. C-1-91-96

United States District Court
Southern District of Ohio

Western Division

P. LARUE SIMPSON,

Plaintiff

vs

ERNST & YOUNG,

Defendant.

Filed April 21, 1994.

ORDER

This case is before the Court following motions for summary judgment, arguments thereon, and responsive pleadings. (Docs. 162, 163, 165, 166). Plaintiff P. LaRue Simpson brings this action against Ernst & Young alleging claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*; Age Discrimination By Employers, Ohio Revised Code § 4101.17; the Employee Retirement Income Security Act (ERISA); as well as an Ohio common law unjust enrichment claim. The Court dismissed the latter claim. (Doc. 101).

Simpson contends that he was Ernst & Young's employee; therefore, this Court has jurisdiction over his ADEA, Ohio age discrimination, and ERISA claims. Ernst & Young contends that Simpson was a partner, and, because these statutes apply only to employees, he has no claim as a matter of law. Following denial of both parties' initial motions for summary judgment, they consented to jury trial and entry of final judgment by the Magistrate Judge.

A trial was held on the preliminary jurisdictional issue whether Simpson was an Ernst & Young employee. This resulted in a mistrial when the jury was unable to agree upon a verdict. (Doc. 154). Based on the trial evidence, the parties agreed there are no disputed questions of material fact on the jurisdictional issue and resubmitted it to the Court for summary judgment. The parties also submitted for summary judgment the issue whether Simpson was an employee within the meaning of ERISA. (Id.).

UNDISPUTED FACTS

The following facts are gleaned from the trial evidence and exhibits and are undisputed.

Simpson, a Certified Public Accountant (CPA), was born on September 27, 1943. Ernst & Young is a large accounting firm created in 1989 by the merger of the Ernst & Whinney and Arthur Young accounting firms. Prior to his relationship with Ernst & Young, Simpson was the Managing Partner for Arthur Young's Cincinnati, Ohio office.

I. The Ernst & Young Merger

In June 1989, Arthur Young distributed to its partners a Merger Agreement (Pl. Ex. 73) and an Information Document For Partners (Pl. Ex. 69). The Information Document represented that the "worldwide" combination of Arthur Young and Ernst & Whinney would result in the largest and strongest international professional services firm in the world. (Id., p. 3). The two firms were described as being compatible because, among other things, they "care for individuals by promoting and recognizing them based on performance" and have "mutual respect among partners." (Id., p. 5). Both were estimated to have good increases in their 1990 and 1991 cash earnings, despite merger costs. (Id., p. 36). The Information Document represented that Arthur Young partners would receive equal or better benefits under the Ernst & Young retirement plan. (Id., p. 55). Arthur Young and Ernst & Whinney represented to their partners and the public that the merger was not expected to result in a reduction in partners. (Doc. 144, p. 289).

The merger vote was conducted by signed ballot. Simpson voted in favor of the merger. At the time of the vote, no options were presented for the continuation of Arthur Young, and the

merger was strongly recommended by those in high management positions.

On October 1, 1989, the merger was effected. The merged firm organized itself into two entities: Ernst & Young and Ernst & Young U.S. The Ernst & Young Partnership Agreement (the Partnership Agreement) required the signatories, who are termed "Partners," to be CPAs and to sign a second agreement, the Ernst & Young U.S. Partnership Agreement (the U.S. Agreement). The signatories to the U.S. Agreement were not termed "Partners," but were denominated "Parties" and consisted of individuals who were both CPAs and non-CPAs. The CPAs were referred to as "Capital Account Parties," and the non-CPAs were termed "Investment Account Parties."

II. The Merged Firms' Management

A Management Committee consisting of ten to fourteen Parties and a Chairman was responsible for the management of Ernst & Young U.S. (Pl. Ex. 46, Sec. 3(a), (d)). Its responsibilities included addition or discharge of Parties, decisions on mergers and acquisitions, allocation of earnings among the Parties, and appointment or removal of the Chairman. (Id., Sec. 3(d)). The Chairman selected new members of the Management Committee subject to the approval of the other members of the Management Committee and the Advisory Council. (Id., Sec. 3(a)). The Advisory Council consisted of the Chairman, not more than four members of the Management Committee, and eighteen other members elected by the Parties. (Id., Sec. 5(a)). It served in an advisory capacity to the Management Committee. (Id., Sec. 5(c)).

As an Ernst and Young U.S. Party, Simpson had one vote for each vacancy on the Advisory Council. (Id., Sec. 5(b)). A Nominating Committee, appointed by the Management Committee, nominated one Party for each vacancy as it occurred on the Advisory Council. Advisory Council nominees were unopposed. (Id.).

The makeup of Ernst & Young's Management Committee was identical to the Ernst & Young U.S. Management Committee. (Pl. Ex. 75, Sec. 2(b)). Upon the selection of a member to the Ernst & Young U.S. Management Committee, that person automatically became a member of Ernst & Young's Management Committee.

(Id.) The Management Committee was responsible for Ernst & Young's general management. (Id., Sec. 2(a)).

III. The Parties' Investment In Ernst & Young U.S.

Both Capital Account Parties, such as Simpson, and Investment Account Parties were required to contribute funds into a Capital Account or an Investment Account, respectively. The Management Committee determined the amount each Party was required to contribute. (Pl. Ex. 46, Sec. 6(a)). Simpson appears to have contributed $84,000 to his Capital Account. (Df. Ex. 527). The Parties "capital contributions" were accomplished without any out-of-pocket expense to them. Ernst & Young U.S. arranged with Citibank to borrow the capital contribution funds on the Parties' behalf. (Pl. Ex. 69, p. 55). The firm did not guarantee these loans. (Doc. 147, p. 449). It did, however, pay the periodic interest due from the Parties to Citibank and debited the parties' accounts accordingly. (Id., p. 450). In addition, the Parties earned interest on their "capital contributions," which Ernst & Young U.S. paid to them.[1] The Parties were required to reduce the balance of their Accounts ten percent per year beginning the third year after the merger. (Id., p. 443).

Regarding Ernst & Young, the Partnership Agreement states that "At [sic] October 1, 1989, the amount of the Capital Account of each Partner shall be established by the Management Committee." (Pl. Ex. 75, Sec. 4(a)). Simpson did not establish a capital account for this entity.

Upon dissolution of Ernst & Young U.S., the Management Committee will determine the amount owing to former Parties and current Parties. (Pl. Ex. 46, Sec. 18). Upon dissolution of Ernst & Young, the Management Committee, in its discretion, will

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[1] Prior to the merger, Parties were to be paid interest on the Capital and Investment Accounts at approximately the prime rate. (Pl. Ex. 69, p. 54). Pursuant to the U.S. Agreement, the Parties received a "special earnings allowance" from Ernst & Young U.S., based on its use of the Capital and Investment Account funds at such rate as the Management Committee established. (Pl. Ex. 46, Sec. 9). The firm treated this allowance as a payment of interest. (Doc. 147, pp. 504-05).

allocate to the Partners the liquidation proceeds. (Pl. Ex. 75, Sec. 9).

As a Capital Account Party, Simpson was stated to be jointly and individually liable for the losses of Ernst & Young U.S. (Pl. Ex. 46, Sec. 19); as a Partner, he was stated to be jointly and individually liable for Ernst & Young losses. (Pl. Ex. 75, Sec. 10).

IV. Simpson's Earnings

Ernst & Young U.S. paid Simpson an annual salary in an amount the Management Committee determined, which was charged as a business expense. (Pl. Ex. 46, Sec. 8(b)). For state tax purposes, Ernst & Young U.S. treated Simpson's salary as just that—a salary. (Doc. 147, p. 449). For federal tax purposes, however, Ernst & Young U.S. reported his salary on a Schedule K-1 as a distribution of partnership earnings. For the 1990 tax year, Simpson represented in his federal tax return that Ernst & Young U.S. was a partnership and that he was a partner.

The Partnership Agreement did not reference a payment of salary; it stated that Ernst & Young's profits and losses, if any, were allocated as the Management Committee in its sole discretion determined. (Pl. Ex. 75, Sec. 4(b)). Simpson, however, received no compensation from Ernst & Young.

In addition to a salary, Ernst & Young U.S.'s Management Committee determined the amount of an "allocation" payable to each Party. (Pl. Ex. 46, Sec. 8(b)). This allocation was based on performance, level of responsibility, years of service, and other factors. (Pl. Ex. 69, p. 54).

V. Simpson's Rights

As an Ernst & Young U.S. Party, Simpson had the right to vote on proposed major firm combinations in the manner determined by the Management Committee (Pl. Ex. 46, Sec. 17). He had the right to vote on amendments to the U.S. Agreement (Id., Sec. 22). He also had the right to vote on the dissolution of Ernst & Young U.S. (Id., Sec. 18). The Advisory Council, however, was responsible for approval of any matter submitted to the Parties for vote. (Id., Sec. 5(c)(v)). As an Ernst & Young Partner, Simpson had the right to vote for the dissolution of Ernst

& Young. (Pl. Ex. 75, Sec. 9). He also had the right to vote on any amendment to the Partnership Agreement. (Id., Sec. 13).

Simpson did not have the right to vote for members of the merged firms' Management Committees, see supra, pp. 650-51; however, the Management Committee nominees were made known to Simpson and other members of Arthur Young and Ernst & Whinney prior to the merger. (Pl. Ex. 69, p. 27; Pl. Ex. 73, p. 6).

Arthur Young partners had the right to an accumulated UBT, which was to be paid to them over an eight year period following withdrawal or retirement from that firm. UBT was an acronym for unbilled time and uncollected fees. (Pl. Ex. 69, p. 56). As a former partner of Arthur Young, Simpson retained ownership of his Arthur Young UBT account after the merger. Neither Ernst & Young nor Ernst & Young U.S. gave Simpson any UBT rights.

Simpson did not have the right to examine the books, records, or accounts of Ernst & Young U.S. or Ernst & Young, except to the extent that the Chairman or Management Committee might permit. (Pl. Ex. 46, Sec. 20(e); Pl. Ex. 75, Sec. 7(d)). He was also required to maintain a will providing that his heirs and personal representatives would accept as correct the entities' accounts without examination or verification of the books and records. (Id.).

Simpson had no right of access to legal opinions issued by Ernst & Young's general counsel; general counsel did not consider Simpson to be his client. Ernst & Young claimed attorney-client privilege to prevent Simpson from obtaining a relevant legal memorandum written by its general counsel to the Management Committee prior to Simpson's termination from Ernst & Young. (Doc. 46).

Simpson was unable to sign promissory notes binding the respective entities. (Pl. Ex. 46, Sec. 20(a)(i); Pl. Ex. 75, Sec. 7(a)). He could not assign, pledge, or otherwise transfer his interest in either entity. (Pl. Ex. 46, Sec. 20(b); Pl. Ex. 75, Sec. 7(b)). He could not become a director or executive of any corporation other than non-profit or charitable organizations without the consent of the Chairman. (Pl. Ex. 46, Sec. 20(a)(ii)). He also

could not make any loan or advance any of his funds to another Party or employee of Ernst & Young U.S. (Id., Sec. 20(a)(iii)).

As an Ernst & Young U.S. Party, Simpson was required to have his performance reviewed annually by his supervisor. He was not entitled to know other Ernst & Young U.S. Parties' compensation.

The U.S. Agreement contains a detailed section entitled "Retired Parties," which addresses, among other items, payments to Retired Parties. (Pl. Ex. 46, Sec. 12). The U.S. Agreement also contains a detailed section entitled "Disability." (Id., Sec. 13). The Partnership Agreement does not address these issues.

Following the merger, Simpson lost his position as Managing Partner in charge of the Cincinnati office and was named Director of Entrepreneurial Services for that office, a lesser position. Simpson did not have authority to operate Entrepreneurial Services according to his own discretion. He was obligated to implement a national strategic plan under the authority of the Cincinnati Office's Managing Partner. He could not transfer, hire, or fire Entrepreneurial Services personnel. Simpson was also involved in the development of a marketing plan for the Cincinnati office. He had no authority to sign the firm's name to an audit. Nor did he have authority to accept new clients for the firm.

VI. Simpson's Discharge

At the time of the merger, an analysis of the merged firms' retirement benefit plans showed that the accumulated benefit obligations were $290,000,000 higher than the funding then available. (Doc. 144, pp. 279-80, 285). Despite representations that the merger was not expected to result in a reduction in "partners" (Id., p. 289), the Management Committee had concluded that a substantial number of "partners" would have to be discharged. An October 5, 1989 memorandum from Ernst & Young's first Management Committee meeting indicated "excess professional staff capacity to be about 8%" and stated that the "Plan is to act on 5% excess by November 15 ..." (Pl. Ex. 30). The agenda for the December 18, 1989 Management Committee meeting included items entitled "Partner movement and retention" and "1990 Partner Admissions." (Pl. Ex. 31). "Partner

movement" meant discharging partners as well as partner retirement. (Doc. 144, p. 250).

The December 18, 1989 Management Committee agenda included a list of former Arthur Young partners by age, showing the total number of years with Arthur Young, the total number of years as a "partner," and any break in service. (Pl. Ex. 35). These are items considered in determining whether a Party has worked the years necessary to vest in a retirement plan. (Doc. 144, pp. 263-64). The February 21, 1990 Management Committee agenda addressed "Partner resignations and retirements" as well as the "1990 Partner recommendation process." (Pl. Ex. 37). Regarding the former, the agenda included a table entitled "Comparison of Partner Ages in Fiscal 1990," which grouped partners by age. (Id.). Ernst & Young Management Committee member Jesse Miles stated that the firm engaged in a "process of resignations and retirements" to reduce the number of "partners" ... "in order to protect the firm from substantial reduction in profits." (Doc. 144, p. 266). He characterized the process as a "lay off." (Id., p. 291).

When asked whether the Management Committee considered a freeze on the admission of new partners or a reduction in the earnings of present partners as an alternative to discharging current partners, Miles testified that would have been "a dumb move." (Id., p. 261). He stated the firm did not want to lose its recently hired accountants or its ability to attract accountants. "And you encourage bright, capable young people to join the firm with the objective of success. And success is called partnership in a major accounting firm. And in order to keep those people attracted, making adequate income and wanting to stay with the firm, they have to be able to know that they stand a chance of becoming partners." (Id., p. 262).

The Management Committee had the right to request Simpson to terminate his relationship with Ernst & Young U.S. by giving him six months written notice. (Pl. Ex. 46, Sec. 11(a)). Simpson had no right to appeal his discharge or the discharge of any other Party. Upon discharge, the Management Committee determined the net amount owing to a Party. That determination was final and binding. (Id., Sec. 11(b)).

During the period October 1, 1989 through March 25, 1991, Ernst & Young U.S. discharged approximately 127 Parties while hiring approximately 122 new accountants. (Pl. Ex. 109). In May 1990, Ernst & Young U.S. requested Simpson's resignation. He refused, and on June 19, 1990, he was given written notification that he was discharged effective December 19, 1990. He was then 46 years old.

The amount due Simpson upon discharge was calculated in December 1990, nine months prior to the end of Ernst & Young's fiscal year. (Doc. 147, p. 508).

OPINION

I. The Court Should Apply Traditional Partnership Law Concepts In Determining Whether Simpson Was A Partner Or An Employee

Pursuant to 29 U.S.C. § 623(a)(1), it is "unlawful for an employer ... to discharge any individual ... because of such individual's age." The Act defines an employee as "an individual employed by any employer." 29 U.S.C. § 630(f). An employer is defined as "a person engaged in an industry affecting commerce who has twenty or more employees ..." 29 U.S.C. § 630(b). Title VII of the Civil Rights Act of 1964, which prohibits discrimination against employees because of race, color, religion, sex or national origin, provides no further guidance on the definition of "employee." 42 U.S.C. § 2000e *et seq.*[2] These definitions are circular and explain nothing. *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344, 1348 (1992). Nevertheless, it is clear that ADEA, Title VII, and AWDA serve to protect "the enormously important right to equal employment," *LeMasters v. Christ Hospital*, 777 F. Supp. 1378, 1379 (S.D. Ohio 1991) (Spiegel, J.), and to eradicate from the workplace the evil of

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[2] ADEA was enacted to fill the gap left by Title VII, which did not address age discrimination. The prohibitory language in ADEA is strikingly similar to that of Title VII and many courts have relied on Title VII precedent to interpret ADEA. *See e.g., EEOC v. Elrod*, 674 F.2d 601 (7th Cir. 1982). The Americans With Disabilities Act (AWDA) similarly prohibits discrimination against disabled individuals. 42 U.S.C. § 12101 *et seq.*

discrimination on account of an individual's age, race, color, religion, sex, national origin, or handicap. *See Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983).

Ernst & Young asserts that neither Simpson nor any other Party discharged during 1990 and 1991 is entitled to the protection afforded by the employment discrimination laws because these individuals are not employees, but partners. The inescapable logic of this position is that Ernst & Young claims to be free to discriminate against hundreds of its accountants due to age, race, sex, religion, national origin, and handicap because it asserts they are not employees.

Simpson, who considered himself to be a partner during his employment with Ernst & Young, now contends that he was actually an employee, as that term is defined in the law, and did not meet the legal definition of partner. He seeks the protection of the age discrimination laws. Relying on *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961), and *Armbruster*, 711 F.2d at 1339-40, Simpson contends that the Court should use an "economic reality" test rather than traditional legal concepts in determining whether he was a partner or employee. The Sixth Circuit has described this test as "a loose formulation, leaving the determination of employment status to case-by-case resolution based on the totality of the circumstances." *Lilley v. BTM Corporation*, 958 F.2d 746, 750 (6th Cir.), *cert. denied*, 113 S. Ct. 376 (1992).

Ernst & Young contends that an economic reality test is not the appropriate means to determine whether an individual is a partner or employee and that Simpson's status must be determined by the application of traditional partnership law concepts. Ernst & Young claims Simpson possessed both "essential and non-essential" attributes of a partner. It argues that whatever partnership characteristics Simpson lacked, he voluntarily delegated them to the Management Committee and their absence did not destroy his

partner status.[3] Therefore, it claims, the Court has no jurisdiction over his age discrimination claims.

The Supreme Court developed the economic reality test in a Fair Labor Standards Act (FLSA) case. *See Goldberg*, 366 U.S. 28. In so doing, it relied on FLSA's provision that the term "employ" includes "to suffer or permit to work," 29 U.S.C. § 203(g), a definition not found in ADEA, Title VII, or AWDA. The Sixth Circuit has applied the economic reality test to determine whether an individual was an employee rather than an independent contractor under the employment discrimination laws, *see Lilley*, 958 F.2d 746; *Armbruster*, 711 F.2d 1332, but has not yet addressed the partner vs. employee question. Nor has the Supreme Court addressed the issue.

In *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344 (1992), decided after the aforementioned cases, the Supreme Court unanimously ruled that traditional agency law criteria should be used to determine whether the plaintiff was an independent contractor or an employee under ERISA. In so ruling, the Court rejected its reasoning in previous cases decided under the National Labor Relations Act, *NLRB v. Hearst*, 322 U.S. 111, 124 (1944), and Social Security Act, *United States v. Silk*, 331 U.S. 704, 713 (1947), which, applying the economic reality test, held "employee" was construed more broadly than the common law definition. *Darden*, 112 S. Ct. at 1349. The Court noted that Congress amended the National Labor Relations Act to effectively nullify the Hearst decision and require the application of traditional agency principles in distinguishing employees from independent contractors. Id. As a result, in 1989, the Supreme Court abandoned its emphasis on construing "employee" in light of the mischief to be corrected and the end to be attained by the statute in question in favor of a traditional legal definition. Id., *citing*

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[3] This Court has previously rejected Ernst & Young's contention that Simpson's use of the term "partner" in his complaint constitutes a judicial admission of his employment status. (Doc. 101, pp. 9-10). The Court also found that Simpson's vote in favor of the merger and his signing the Partnership Agreement and U.S. Agreement have no significance in the determination of his employment status. (Id., p. 10).

Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

The Court distinguished the economic reality test applied in FLSA cases, *see Goldberg*, 366 U.S. 28; *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), because unlike ERISA, FLSA contained an "expansive" definition of the verb employ to mean "suffer or permit to work." *Darden*, 112 S. Ct. at 1350. The Court further rejected the use of a test based upon the claimant's expectations as begging the question whether he held employee status, because such an approach would "compromise the capacity of companies ... to figure out who their 'employees' are and what ... their pension fund obligations will be." Id.

Because ADEA, Title VII, and AWDA also lack FLSA's "expansive" definition of the verb "employ," Darden indicates that the Sixth Circuit's use of the economic reality test in employment discrimination cases may be in error. Although neither the Supreme Court nor the Sixth Circuit has addressed the proper test to be used to distinguish partners from employees, Darden strongly counsels the use of traditional legal principles to determine this issue rather than a broader test.

Under *Darden's* traditional agency law principles test, numerous factors regarding the employment relationship are considered, and no one factor is decisive. 112 S. Ct. at 1349. The Supreme Court approved the following factors in an analysis of whether Darden was an independent contractor or employee: 1) the hiring party's right to control the manner and means by which the product is accomplished; 2) the skill required by the hired party; 3) the source of instrumentalities and tools; 4) the location of the work; 5) the duration of the relationship between the parties; 6) the hiring party's right to assign additional projects; 7) the hired party's discretion over when and how long to work; 8) the method of payment; 9) the hired party's role in hiring and paying assistants; 10) whether the work is part of the hiring party's regular business; 11) whether the hiring party is in business; 12) the hired party's employee benefits; and 13) tax treatment of the hired party's compensation. *Darden*, 112 S. Ct. at 1348. The application of these factors to this case would result in a finding that Simpson was an employee. The agency test, however, is more relevant to the independent contractor vs. employee issue than to the partner vs.

employee issue, because Simpson was an agent of Ernst & Young, whether he was a partner or an employee.[4]

What is pertinent about *Darden's* agency law test is the Court's comparison of the independent contractor characteristics the claimant possessed to his employee characteristics when deciding whether he was an independent contractor or an employee. No one factor is controlling. The *Darden* rationale also rejects the premise that if the claimant possessed any characteristics of an independent contractor, he could not be considered an employee under the traditional agency law test. [illegible]st & Young has cited, and we have found, no case standing fo[illegible] proposition that if a claimant possesses any characteristics [illegible] partner, this precludes him/her from being an employee.

Although the traditional agency law test is not applicable to the partner vs. employee cases, one common thread exists between the latter cases and the independent contractor vs. employee cases: bona fide independent contractors and partners are employers, not employees. As an employer, an individual is not entitled to ADEA or ERISA coverage.

We do not view the *Darden* analysis as a quantitative test where the Court simply adds up employee and employer attributes a claimant possessed. Rather, it must be a qualitative test to determine whether the claimant actually met the traditional legal definition. In order to determine whether Simpson was a bona fide partner, we must examine the traditional legal concepts of partnership.

II. Traditional Partnership Law Concepts

The parties agree that New York law applies to the Ernst & Young organization. Both the Partnership Agreement and the U.S. Agreement state that their construction is in accordance with the laws of the State of New York. (Pl. Ex. 75, Sec. 12; Pl. Ex. 46, Sec. 21). In New York, traditional partnership concepts are codified in N.Y. PARTNERSHIP LAW § 1 *et seq.* (McKinney 1988) and are set forth in the state's case law.

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[4] A partner is an agent of the partnership. N.Y. PARTNERSHIP LAW § 20 (McKinney 1988).

A partnership is an "association of two or more persons to carry on as co-owners a business for profit." N.Y. PARTNERSHIP LAW § 10 (McKinney 1988). Thus, a bona fide partner is one who owns the business, i.e., an employer.

While sharing the firm's gross receipts does not establish a partnership, id., § 11(3), sharing the firm's net profits may be prima facie evidence that one is a partner. Id., § 11(4). No such inference may be drawn, however, if the share of profits was received in payment of a debt, as employee wages, or as loan interest even though the amount of payment varied with the profits of the business. Id.

Partners are jointly liable for all partnership debts and obligations. Id., § 26. A partner contributes toward the partnership losses according to his proportionate share in the profits. Id., § 40(1).

A partner is repaid his capital contribution and shares equally in the partnership's profit after all liabilities are satisfied. Id.

A partner receives interest on his/her capital contribution only from the date when repayment should be made. Id., § 40(4).

The partnership must indemnify a partner. Id., § 40(2).

All partners have equal rights in the management and conduct of partnership business. Id., § 40(5).

No person may become a member of a partnership without the consent of all partners. Id., § 40(7).

While any difference arising as to ordinary matters connected with the partnership may be decided by a majority of the partners, no act in contravention of the agreement between the partners may be done without the consent of all partners. Id., § 40(8).

Subject to any agreement between the partners, the partnership books are kept at the principal place of the partnership's business. Id., § 41. Every partner must have access to and may inspect and copy any of the partnership records. Id. A partner has a duty to render, on demand, all information affecting the partnership. Id., § 42.

Partners owe a fiduciary duty to one another. Id., § 43. The nature of the fiduciary duty is such that each partner owes to the

others the highest degree of fidelity, loyalty, and fairness in their mutual dealings. *Application of Lester*, 87 Misc.2d 717, 386 N.Y.S.2d 509 (Sup. Ct. 1976). Because of this fiduciary duty, in their dealings with one another partners cannot fall back on morals of the marketplace. *Auld v. Esteridge*, 86 Misc.2d 895, 382 N.Y.S.2d 897 (Sup. Ct. 1976), *aff'd*, 58 A.D.2d 636, 395 N.Y.S.2d 969 (App. Div.), *appeal denied*, 43 N.Y.2d 641, 371 N.E.2d 830 (1977).

The property rights of a partner are: 1) his rights in specific partnership property; 2) his interest in the partnership; and 3) his right to participate in the management of the partnership. Id., § 50. As to specific partnership property, a partner is co-owner with his partners as a tenant in partnership. Id., § 51. A partner's interest in the partnership is his share of the profits and surplus. Id., § 52.

While N.Y. PARTNERSHIP LAW § 40 implies that certain partnership rights may be delegated by agreement, the following rights set forth in other sections are not delegable:

The right to access, inspection, and copying of partnership books, id., § 41;

The duty of partners to render to another partner on demand true and full information of all things relating to the partnership, id., § 42;

The fiduciary duty one partner owes another, id., § 43; The right to participate in the management of the partnership, id., § 50, even though a partner may delegate his equal share of management and operations, id., § 40(5);

The right of a partner to be a co-owner of partnership property, § 51; and

The right to share the profits and surplus, id., § 52.

The Uniform Partnership Act (UPA) has been adopted by most states, including New York in 1919, as the governing body of partnership law. It sets forth, among others, the following characteristics of a partner: unlimited liability (§ 15); the right to share in profits and participate in management (§ 18(a), (e)); the right and duty to act as an agent of the other partners (§ 9); shared ownership (§ 6); and fiduciary relationship among partners (§ 21).

The drafters of the UPA used the term "co-owners" to indicate that each partner has "the power of ultimate control." UNIF. PARTNERSHIP ACT § 6 official cmt., U.L.A. (1969).

The concurring opinion in *Hishon v. King & Spaulding*, 467 U.S. 69 (1984), also provides some guidance as to the nature of partnership. There, Justice Powell reasoned that the relationship among partners should not be characterized as an employment relationship to which Title VII may apply:

> The relationship among law partners differs markedly from that between employer and employee . . . . The essence of the law partnership is the common conduct of a shared enterprise. The relationship among law partners contemplates that decisions important to the partnership normally *will be made by common agreement . . . or consent among the partners*.

Id. at 79-80, 104 S. Ct. at 2236 (emphasis added). Critical to this concept of a professional partnership is the partners' authority to make decisions important to the partnership. The mere labeling of an individual as a partner does not make him so. *Id.* at 80, n. 2, 104 S. Ct. at 2236, n. 2. *See also EEOC v. Peat, Marwick, Mitchell & Co.*, 589 F. Supp. 534, 539 (E.D. Mo. 1984), *aff'd*, 775 F.2d 928 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986).

Ernst & Young cites the following cases in support of its contention that the protections of ADEA do not extend to members of professional organizations, such as Simpson. Most of these cases provide little guidance.

In *Burke v. Friedman*, 556 F.2d 867, 869 (7th Cir. 1977), a Title VII action brought against an accounting firm, the Seventh Circuit, with little analysis, concluded that "we do not see how partners can be regarded as employees rather than as employers who own and manage the business." The Seventh Circuit neither questioned the plaintiff's status as a partner nor did it set forth any facts relative to the plaintiff's relationship with her accounting firm.

In *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984), a Title VII action brought against a law firm, the Seventh Circuit extended its holding in *Burke* to encompass shareholders in a professional corporation based on the rationale that the "management, control, and ownership" of a professional

corporation is much like the "management, control, and ownership" of a partnership. Id. at 1178. As in *Burke*, the Seventh Circuit in *Dowd & Dowd* did not question the plaintiff's status as an owner/shareholder nor did it discuss what management, control, or ownership rights the plaintiff possessed.

Hyland v. New Haven Radiology Associates, P.C., 794 F.2d 793 (2nd Cir. 1986), also offers no guidance as to what characteristics an employer should possess. In that case, the Second Circuit concluded that, since the plaintiff-physician was a member of a professional corporation, he must be an employee and covered by ADEA. Id. at 798. The Second Circuit found any inquiry into the plaintiff's partnership status to be irrelevant. Id.

On the other hand, *Wheeler v. Hurdman*, 825 F.2d 257, *cert. denied*, 484 U.S. 986 (1987), relied upon by Ernst & Young, is instructive. Wheeler brought an action against her accounting firm claiming age and sex discrimination. Although Wheeler conceded her status as a partner, she contended that she was also an employee under ADEA and Title VII. The Tenth Circuit reversed the district court's application of the economic reality test and instead relied upon the Uniform Partnership Act. It recognized that an individual cannot be both a *bona fide partner* and an employee under ADEA or Title VII. Id. at 277 (emphasis added). After delineating the attributes of a bona fide partner, the Court concluded that the "total bundle of partnership characteristics" differentiated partners from employees. Id. at 276.

The Court listed factors which distinguished Wheeler's partnership from her prior position as an employee with the firm: 1) participation in profits and losses; 2) exposure to liability; 3) investment in the firm; 4) partial ownership of firm assets; 5) voting rights; 6) position under the partnership agreement; and 7) position under partnership laws. Id. Wheeler possessed the following partnership attributes: she had signed a partnership agreement; her compensation was not a salary but a share of the firm's profits paid by draw and an allocation of profits based on points; she made a genuine capital contribution; she had unlimited personal liability for partnership debts; she had the right to vote on dissolution, large mergers, admission of new partners, partner termination, shares of net profits, special distributions, and any

other allocation of income; she could sign audits and tax returns; and she was reimbursed for certain club dues. Id. at 260.

Implicit in the Tenth Circuit's decision is the concept that, had Wheeler possessed something less than the "total bundle of partnership characteristics," she would not have been considered a bona fide partner, even though the firm so denominated her. *Wheeler* possessed more characteristics of a partner than did Simpson. *See* detailed discussion *infra*, pp. 21-30. Aside from the cases Ernst & Young cited, the following cases are also pertinent.

In *Fountain*, 925 F.2d 1398, the issue was whether the plaintiff was a partner or an employee of his accounting firm under ADEA. The Eleventh Circuit held:

> [W]e look to the particular circumstances of the case at hand, (citation omitted) and, in so doing, we focus not on any label, but on the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control and ownership.

Id. at 1400-01. Looking beyond corporate nomenclature, the Court found Fountain, one of four shareholders in a professional corporation, to be a partner based on the following facts: 1) he was compensated on the basis of a share of the firm's profits; 2) he was liable for certain debts of the firm; and 3) he had the right to vote proportionate to his ownership share on amendments to the agreement, admission of new partners, termination of partners, and distribution of profits and income. Id. at 1401. Fountain possessed more characteristics of a partner than Simpson.

In *Caruso v. Peat, Marwick, Mitchell & Co.*, 664 F. Supp. 144 (S.D.N.Y. 1987), the issue was whether the plaintiff was a partner or an employee of his accounting firm under ADEA. The District Court rejected a per se rule exempting individuals termed partners from ADEA protection, because such a rule would allow employers to strip employees of their ADEA rights simply by calling employees partners without giving them any decision-making authority or job security. Id. at 148. The Court also reasoned that the adoption of such a rule would prevent invocation of ADEA by physicians, accountants, attorneys, and other professionals who have traditionally organized their

businesses as partnerships. The Court held there is nothing in the legislative history of ADEA or other anti-discrimination statutes which suggests that these statutes should not apply to such professionals, noting that the Senate rejected an amendment to Title VII which would have exempted physicians. *Id.*, *citing EEOC v. Rinella & Rinella*, 401 F. Supp. 175, 180-81 (N.D. Ill. 1975).

The *Caruso* Court focused on three traditional partnership law factors: 1) the extent of the claimant's ability to control and operate his business; 2) the extent to which the claimant's compensation was calculated as a percentage of the firm's profits; and 3) the extent of the claimant's employment security. 664 F. Supp. at 149-50. The Court denied the defendant's motion to dismiss and motion for summary judgment based on the following facts: Caruso did not hold a management position; he could make few discretionary decisions on behalf of his clients without management approval; he was required to submit time sheets; he received a set period of vacation time every year; he was subject to formal job evaluation; he could make no personnel decisions on his own initiative; he held no ownership interest in the firm; he received a base salary plus additional compensation based upon a number of assigned units (he held 350 units on a scale of 175 to 3300); his voting power was determined by the number of his units; and, although he had the power to block a partnership appointment, he had no right to question management's decision to discharge a partner. Id. at 145-46, 149-50; and 717 F.Supp. 219-20, 222-23 (S.D.N.Y. 1989). He was ultimately found to be an employee following a jury trial. *Caruso*, 779 F. Supp. 332, 333 (S.D.N.Y. 1991). Caruso's job attributes were similar to Simpson's; however, Caruso had more partnership characteristics than Simpson. Simpson did not receive compensation based on a pro rata share, nor did he have the power to block a partnership appointment. *See* detailed discussion *infra*, pp. 21-30.

Although *Wheeler*, *Fountain*, and *Caruso* were decided prior to *Darden*, they do not conflict with its rationale. In each case, the court reviewed traditional partnership law factors which differentiate partners from employees. Ernst & Young argues that only the "essential" elements of partner status should be considered, which it identifies as sharing profits and unlimited personal liability. It deems other partnership indicia, such as

capital contribution, ownership interest, and meaningful participation in partnership decisions to be non-essential. Traditional partnership law concepts do not support this selective categorization of partnership indicia. All factors should be considered, with no one factor being decisive. *See Darden*, 112 S. Ct. at 1349; *Wheeler*, 825 F.2d at 276.

We now turn to examine the partner vs. employee characteristics Simpson possessed.

III. Simpson Was An Employee Subject To ADEA Protection

A. Simpson Did Not Make A True Capital Contribution To The Firm

Simpson never established a capital account with Ernst & Young. Therefore, we give no weight to the Partnership Agreement's reference to a Capital Account.

Simpson established an Ernst & Young U.S. Capital Account. Simpson's "capital" payment into this account was arranged by Ernst & Young and financed by Citibank. This "capital contribution" generated interest payments from Ernst & Young U.S. rather than a pro rata share of the profits. The Capital Account was not the basis for a Party's pro rata share of either profits or firm assets. (Doc. 147, p. 512). Thus, Simpson's payment to Ernst & Young U.S. was more akin to a loan than a capital contribution.

Gary Stewart, a CPA and expert in the field of CPA business organizations, testified at trial that Simpson did not contribute capital but rather loaned money to Ernst & Young U.S. (Doc. 146, pp. 367-68). Stewart's opinion was based on several factors: 1) the definition of "firm capital" in Section 7 of the U.S. Agreement indicates that "amounts owing to Parties" are treated as a firm liability rather than as owner's equity (id., p. 365); 2) when a Party withdraws from the firm, he receives only what he paid in plus interest, rather than a percentage of the value of the firm (id., p. 366); and 3) the firm paid interest to the Parties on their Capital Accounts. (Id.)

We view Simpson's Capital Account as a paper transaction designed to give him the appearance, but not the reality, of a partner. On its face, his substantial payment ($84,000) appears to

be a capital contribution to the firm. However, Simpson did not invest one cent of his own money in the firm. The firm arranged the bank loan that Simpson signed and paid the interest on his behalf. He made no payments on the principal. Although the U.S. Agreement bound him to begin reducing the principle in his third year with Ernst & Young U.S., he was discharged before then. Although he was liable to the bank for the principal, his Capital Account at the firm was available to, and ultimately did, satisfy the debt. His yearly earnings and discharge payment were not based on the proportion $84,000 contribution had to total capital investment in the firm. It appears that the primary significance of his Capital Account was not to establish Simpson's ownership interest, but to generate funds for the firm. As of the date of Simpson's termination, he had not made a true capital contribution to the firm.

B. Simpson Did Not Share In The Firm's Profits and Losses

Simpson received no compensation from Ernst & Young. Therefore, we give no weight to the reference in the Partnership Agreement that its profits be allocated among its Partners.

Simpson received an annual salary from Ernst & Young U.S., as determined by the Management Committee. The U.S. Agreement does not identify Simpson as a partner and specifically refers to his compensation as "salary." For state tax purposes, Ernst & Young U.S. treated Simpson's compensation as salary. For federal tax purposes, however, it treated it as a partnership distribution of earnings. This is of little significance, because under Internal Revenue Code regulations, a partnership is considered to be anything which is not a corporation, trust, or estate. 26 C.F.R. § 301.7701-3(a). Simpson's salary did not vary based on the rise and fall of firm profits. There was no evidence that Simpson or any other Party were required to return any amount of salary due to declining profits. Nor was there evidence that his salary was calculated as a proportionate share of the firm's profits.

In addition to his salary from Ernst & Young U.S., Simpson was eligible to receive an "allocation" each year, also determined by the Management Committee. Neither party discussed in their

memoranda the relative amounts of Simpson's salary compared to his allocation or its significance. Pursuant to the U.S. Agreement, a Party could receive advances against his/her allocation, but would have to return any advances in the event that they exceeded the allocation. The separate denominations and treatment of salary and allocation indicate that the two items are different. There is no evidence, however, that allocations were calculated from net profits or even from gross receipts. Nor is there evidence that Simpson's allocation was calculated as a proportionate share. (Pl. Ex. 46, Section 8(a), (b)). The U.S. Agreement fails to set forth any formula for calculating allocations, leaving the determination instead to the Management Committee. Id. Since Simpson had no right to an accounting as to how his allocation was calculated, he did not have the ability to offer evidence on this issue. It is fair to infer that, had Simpson's allocation been calculated from his proportionate share of net profits, Ernst & Young would have introduced that favorable evidence. Therefore, we conclude the allocation was comparable to a periodic bonus paid to an employee at the firm's discretion from the firm's gross revenues. *See Caruso*, 664 F. Supp. at 150.

In contrast to Simpson, the plaintiff in *Wheeler*, found to be a partner, received a share of the firm's profits and an allocation of profits based on points. *Wheeler*, 825 F.2d at 260. The plaintiff in *Fountain*, found to be a partner, shared in the firm's profits, losses, and expenses and was compensated on the basis of a share in the firm's profits. *Fountain*, 925 F.2d at 1401.

C. Simpson Had No Other Indicia Of An Ownership Interest In The Firm

Ernst & Young contends that Simpson's ownership rights in the firm are demonstrated by his UBT account. The UBT account, however, is not indicative of his relationship with Ernst & Young since this account was a carry-over from his prior relationship with Arthur Young. Neither Ernst & Young nor Ernst & Young U.S. utilized UBT accounts. Their failure to continue a UBT arrangement demonstrates that the firms, rather than their members, owned the accounts receivable. (*See* Pl. Ex. 69, p. 56).

Ernst & Young also contends that Simpson had a contingent undivided interest in all firm assets, citing the U.S. Agreement,

Section 18. That section, however, applies only upon dissolution or liquidation of the firm. When Simpson left the firm, Ernst & Young U.S. calculated his compensation in December, nine months prior to the firm's fiscal year end, using an estimate based on the prior year's figures. (Doc. 147, pp. 508-09). Thus, Simpson's discharge compensation was not measured by any ownership interest in the firm's assets but was a salary. Furthermore, Section 18 states that, upon dissolution or liquidation, the amount owing to each Party shall be computed pursuant to Section 11. The latter does not provide for a distribution of an undivided interest in firm assets. Rather, it awards a Party the amount of his Account, as determined by the Management Committee; any allocations or interest the firm owes the Party; and the Party's proportionate allocation for the current fiscal year, less any liability the Party owes the firm, plus an "earnings charge" pursuant to Section 9 computed by the Management Committee. Simpson did not possess an undivided interest in firm assets.

Ernst & Young claims that Simpson's ownership interest in the firm is shown by his rights regarding the firm's operations. It points to the fact that Simpson could vote for amendments to the Partnership Agreement and the U.S. Agreement, dissolution of the firm, certain mergers, and members of the Advisory Council. Simpson's voting rights, however, were illusory because the Advisory Council had the right to approve and thus, implicitly, to veto any vote put to the Parties. Simpson's right to vote for members of the Advisory Council was perfunctory since the candidates were unopposed and selected by the Nominating Committee which, in turn, was selected by the Management Committee. Furthermore, the Advisory Council had no direct authority to act, serving only in an advisory capacity to the Management Committee. The Chairman selected the members of the Management Committee without any vote of the Parties, and the Management Committee selected the Chairman. The Chairman and the Management Committee managed the firm. Thus, as a practical matter, the Parties had no power to alter decisions of the Chairman and the Management Committee.

Even more illuminating are the issues for which Simpson had no vote. He had no vote for Management Committee membership. He had no vote for the admission of new partners. He had no vote

on the discharge of existing partners, including himself. Finally, he had no vote on how firm members were to be compensated.

In contrast, the plaintiffs in *Wheeler* and *Fountain*, who were found to be partners, had specific voting rights regarding the admission and termination of partners and the distribution of profits. *Wheeler*, 825 F.2d at 260; *Fountain*, 925 F.2d at 1401. *See also Maher v. Price Waterhouse*, No. 84-1522 C(2), 1985 WL 9500 (E.D. Mo. April 8, 1985). Even the plaintiff in *Caruso*, who was ultimately found to be an employee, had more voting rights than Simpson, as he had the power to block a partnership appointment. *Caruso*, 664 F. Supp. at 146.

D. Simpson Had No Right To Examine The Firm's Books And Records

Simpson did not have the unconditional right to examine the firm's books and records, and he was denied access to them regarding the UBT accounts. He had no right to learn the other Parties' compensation. A basic tenant of a bona fide partnership is that every partner shall at all times have access to and may inspect and copy partnership books. N.Y. PARTNERSHIP ACT, § 41 (McKinney 1988); *Romeo v. Russo*, 31 A.D.2d 935, 299 N.Y.S.2d 7 (App. Div. 1969). Although some other emoluments of partnership are, under the New York Partnership Act, implicitly delegable, this section is not subject to variation by agreement of the parties. *Newburger, Loeb & Co., Inc. v. Gross*, 365 F. Supp. 1364, 1369 (S.D.N.Y. 1973).

E. Simpson Had Little, If Any, Management Authority

Contrary to Ernst & Young's conclusory contentions, Simpson had few rights regarding Ernst & Young U.S.'s operations. He did not have the authority to hire, fire, or transfer even clerical workers within or without his department. The operations strategy of his department was determined by a superior. Simpson was subject to annual performance reviews. To the extent involvement in a firm's operations is indicative of being a bona fide partner, the evidence shows that Simpson's partnership interest in Ernst & Young U.S. was slim, at best. *Compare Fountain*, 925 F.2d at 1399 with *Caruso*, 664 F. Supp. at 146, 150. *See also Hishon*, 467 U.S. at 79-80 (concurring opinion).

a vote of the parties, without cause, and without a right to appeal the decision. He had no equity interest in the firm. His "capital contribution" consisted of a paper transaction characterized on the books as a loan for which he received interest from the firm. His loan to the firm entitled him to no ownership interest in firm assets or accounts receivable, and Simpson and other parties possessed no points or units of ownership. He was denied access to the books and records of the firm; the firm even asserted a claim of attorney-client privilege against him. Finally, the firm disclaimed a fiduciary duty toward Simpson, and instead asserted a right to terminate him in order to make room for the "bright young people" and in order to protect compensation levels for those remaining. *See,* Appendix A at 5a-7a; Appendix C at 48a-53a. Based upon this stipulated evidence, the Sixth Circuit Court of Appeals committed no error in determining that Simpson was not a *bona fide* general partner of Ernst & Young.

Similarly, Ernst & Young's contention that parties can reach any agreement they wish and still meet the characteristics of a partnership disregards the specific provisions of the Uniform Partnership Act that mandate certain rights for partners. As the district court correctly observed, certain characteristics of partnership are essential, including among others the right to examine the books and records of the firm, the establishment of a fiduciary duty among partners, and the right of a co-owner to share in the proceeds of the firm. Appendix C at 42a-43a. An agreement which lacks these or other essential characteristics may establish some other type of relationship, such as an employee-employer relationship or a joint venture, but may not establish a partnership (*See*, Appendix C at 55a-56a and n.6). Ernst & Young's representation that the Uniform Partnership Act contains nothing but default provisions is false.

Ernst & Young also contends that the Sixth Circuit's delineation of factors illustrative of the common-law attributes of partnership creates an unworkable test because it contains twelve factors which "may be supplemented by 'other similar indicia of ownership'" (Petition at 27-28). This argument overlooks the holding of the Supreme Court in Darden that similarly lists twelve criteria concerning independent contractor status "among the other factors relevant to this inquiry," and cites as authority the "nonexhaustive criteria" in the Restatement 2d of Agency. Darden, 112 S. Ct. at 1348. Similarly, Judge Daughtrey's concurring opinion creates no confusion as argued by Ernst & Young. Instead, the concurrence clearly adopts and supports every aspect of the holding that Simpson lacks the common-law attributes of a partner. Judge Daughtrey merely adds an additional point questioning the wisdom of excluding from coverage persons in large mega-partnerships because any nominal ownership interest they may have in the firm provides no protection from discrimination. In light of Ernst & Young's argument that modern partnerships do not provide equality (Petition at 27), Judge Daughtrey's concurrence proves quite insightful.

F. The Petition of Ernst & Young Raises No Important Federal Question.

The issue presented by Ernst & Young not only lacks in constitutional importance, but also rises to the level of being offensive to the principles of equality embraced therein. As best summarized by the district court:

> Ernst & Young asserts that neither Simpson nor any other Party discharged during 1990 and 1991 is entitled to the protection afforded by the employment discrimination laws because these individuals are not

> employees, but partners. The inescapable logic of this position is that Ernst & Young claims to be free to discriminate against hundreds of its accountants due to age, race, sex, religion, national origin, and handicap because it asserts that they are not employees.

Appendix C at 37a. No constitutional goal is served by providing sanctuary to such a party.

The issue presented is further of no major precedential value because it is based upon a unique set of facts involving an illusory partnership which was intentionally designed to strip those labeled as partners from true ownership privileges. Ernst & Young's contention of impending chaos among partnerships across the United States therefore lacks validity. Of the 253,000 partnerships in the service industry referred to in its petition, Ernst & Young cites to none that has, for example, asserted attorney-client privilege against a co-owner. Nor has Ernst & Young identified any that instituted an intentional plan to oust older "partners" in order to make room for "bright young people," or one that denied a "partner" access to the books and records of the firm. Only those firms that choose to intentionally strip away the rights and powers of partner status need be concerned with the results in this case.

Furthermore, the facts upon which the appellate court opinion is based no longer exist. Ernst & Young, as evidenced by its petition, now operates as a limited liability partnership. This change in structure occurred shortly after plaintiff's trial in 1994. The agreements upon which this controversy is based have been superseded; even the vesting provisions for the retirement plan have been altered to comply with ERISA. Indeed, each of the Big 6 accounting

firms operates today as a limited liability partnership. The specific factual issue before this court is therefore moot and of no future precedential effect even to Ernst & Young.[5]

IV. CONCLUSION

The Sixth Circuit Court of Appeals correctly determined that plaintiff Simpson lacked the rights and privileges of a *bona fide* general partner, thereby rendering Ernst & Young liable for flagrant violation of the ADEA, ERISA and Ohio employment discrimination law. Ernst & Young's petition for certiorari should be denied.

Respectfully submitted,

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[5]Ernst & Young also required all terminated partners to execute a release in order to obtain limited severance benefits, although Simpson refused to do so.